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On New ‘Judicial Animals’: The Curious Case of an African Court with Material Jurisdiction of a Global Scope

Adamantia Rachovitsa*

ABSTRACT

The article aims to think anew about the jurisdiction *ratione materiae* of the African Court on Human and Peoples’ Rights. The Court, based in Arusha, enjoys a distinctive contentious jurisdiction which extends to the interpretation and application of any other relevant human rights instrument ratified by the States concerned. The Court’s striking features set it apart from human rights bodies and most international courts. Its jurisdiction has been received with scepticism and fear arguing that, if the Court extends its jurisdiction over treaties other than the African Charter on Human and Peoples’ Rights, this will lead to jurisprudential chaos and will undermine the formation of the African *corpus juris*. This article discusses the case law of the Court since 2013, when the Court started functioning, and argues that these concerns are over-emphasized. The analysis underlines the shifting authority of specialized and/or regional courts; the need not to overstress but to appreciate positively instances of divergence; and the consideration of new conceptual and geographical *topoi*, in which international law is to be found and produced.

KEYWORDS: human rights, judicial dispute settlement, jurisdiction *ratione materiae*, African Court on Human and Peoples’ Rights

1. INTRODUCTION

In this article I discuss anew ideas about the jurisdiction *ratione materiae* of the African Court on Human and Peoples’ Rights (‘the Court’ or ACtHPR). The Court, based in Arusha, enjoys a distinctive contentious jurisdiction. Article 3(1) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (‘Protocol to the ACHPR’) reads:

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The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.¹

Article 7 of the Protocol to the ACHPR (sources of law) reads in identical terms.² The distinctiveness of the ACtHPR's jurisdiction lies in the fact that its mandate extends to the interpretation and application of any other relevant human rights instrument ratified by the States concerned. In contrast, the jurisdiction of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) is limited to matters concerning the interpretation and application of the European Convention on Human Rights (ECHR)³ and the American Convention on Human Rights (ACHR),⁴ respectively. Equally narrow is the competence of the United Nations (UN) human rights bodies each of which has been entrusted with monitoring a given treaty. Consequently, the ACtHPR deviates from the 'prototype' of the jurisdiction of a human rights court/body. Its striking features set it apart also from most international courts,⁵ arguably qualifying it as a new 'judicial animal' that introduces a variance in 'judicial genome mapping'.⁶

The ACtHPR's jurisdiction to apply, find a violation of and monitor any other relevant human rights instrument ratified by the States concerned has been received with scepticism and fear. International law scholars, especially (African) scholars writing extensively over the years on the African system on human rights, treat Article 3(1) of the Protocol to the ACHPR as a problematic occurrence, a flaw in the design, or even a mistake in the drafting process.⁷ They argue that if the Court extends its jurisdiction over treaties other than the African Charter on Human and People's Rights ('the Charter' or ACHPR),⁸ this will lead to jurisprudential chaos⁹ and will undermine the formation of the African *corpus juris*.¹⁰ However, the ACtHPR has proved itself willing to exercise its material jurisdiction to the fullest possible extent. It regularly

1 9 June 1998, OAU/LEG/EXP/AFCHPRIPROT(III).

2 'The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned'.

3 1950, ETS 5, see Article 32.

4 1969, OAS TS 36, see Article 62.

5 Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal International Law & Policy* 709 at 721-2; Alter, Helfer and McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal International Law* 737 at 738.

6 Higgins, 'Foreword' in Sands, Mackenzie and Shany (eds), *Manual on International Courts and Tribunals*, 1st edn (1999) at vii.

7 For example, Viljoen, *International Human Rights Law in Africa*, 2nd edn (2012) at 439, n 185; Heyns, 'The African Regional Human Rights System: In Need of Reform?' (2001) 2 *African Human Rights Law Journal* 155 at 167. Cf. Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 *Human Rights Quarterly* 342 at 354.

8 1981, CAB/LEG/67 3 Rev. 5 (1982); 21 ILM 58.

9 Heyns, *supra* n 7 at 167.

10 Ibid.; Mujuzi, 'The African Court on Human and Peoples' Rights and Its Protection of the Right to a Fair Trial' (2017) 16 *The Law & Practice of International Courts and Tribunals* 187 at 193.

examines and pronounces on breaches of UN, regional and sub-regional treaties on human rights, and orders States to comply with their obligations under those treaties. Curiously, not much has been written since 2013, when the Court started functioning and delineating the contours of its jurisdiction.¹¹

In this article I discuss the case law of the Court since 2013 and the ways in which it has construed its jurisdiction. The case law of the Economic Community of West African States Community Court of Justice (ECCJ), which also applies other human rights treaties (see Sections 3B(ii) and 3C(ii) below), is also brought into specific parts of the discussion for the purpose of further illuminating the ACtHPR's practice. Contrary to mainstream scholarship, I submit that the ACtHPR's different treaty design forms new opportunities and introduces a welcome difference in judicial dispute settlement. A large part of the criticism and scepticism towards the Court's broad jurisdiction has inherited a tradition of exaggerated and counterproductive anxiety regarding where the limitations of a specialized and/or regional court lie—even when, as is the case of the ACtHPR, the court is explicitly authorized to interpret and apply other treaties. This anxiety is connected to the limitations of the jurisdiction of regional and/or specialized international courts (on human rights) and the (alleged) ensuing risks of interpreting and developing international law.

It should be noted that the ACtHPR forms part of a series of developments in the judicial settlement of international disputes. Although the multiplication of international courts has taken place to a great extent on the basis of 'templates' used to design other courts,¹² novelties have found their way onto this legal landscape. Such novelties include the emergence of blended models of adjudication;¹³ the creation of courts melding economic and human rights matters into a single jurisdiction;¹⁴ and the establishment of international courts on human rights, which are entrusted to

11 Some few, recent works are Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 *International & Comparative Law Quarterly* 63; Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal International Law* 293; Mujuzi, *supra* n 10; Zschirnt, 'Locking in Human Rights in Africa: Analyzing State Accession to the African Court on Human and Peoples' Rights' (2018) 19 *Human Rights Review* 97; Ondo, 'Les Opinions Séparées des Juges à la Cour Africaine des Droits de l'Homme et des Peuples' (2015) 104 *Revue trimestrielle des droits de l'homme* 941.

12 For example, international economic courts tend to follow the model of either the Court of Justice of the European Union or the World Trade Organisation, and international human rights courts follow the old or the new model of the ECtHR: see Romano, Alter and Sebergondi, 'Illustrations: A Reader's Guide' in Romano, Alter and Shany (eds), *The Oxford Handbook on International Adjudication* (2014) 27 at 30; Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014) at 87–91.

13 For instance, the options under United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 (UNCLOS) to resort to the International Court of Justice (ICJ) or the International Tribunal on the Law of the Sea or to a (special) arbitral tribunal: see Articles 287 and 288 UNCLOS. Another example is the World Trade Organization model under the Dispute Settlement Understanding, which ranges from arbitration to the Appellate Body. See, in general, on the developments which seem to (partly) change the physiognomy of dispute settlement, Murphy, 'International Judicial Bodies for Resolving Disputes between States' in Romano, Alter and Shany, *supra* n 12, 181 at 192–3, 203; and Sands, 'Introduction and Acknowledgments' in Mackenzie et al. (eds), *Manual on International Courts and Tribunals*, 2nd edn (2010) at xii–xiii.

14 For example, the Economic Community of West African States Community Court of Justice (Articles 9(1) and 16 Protocol A/P.1/7/91 on the Economic Community Court of Justice, 6 July 1991) or the African Court of Justice and Human Rights: see Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the 11th ordinary session of the African Union Assembly 2008, not yet in force.

exercise their jurisdiction over more than one human rights treaty.¹⁵ It is puzzling to account for the emergence of these new institutions within the context of the existing categories of dispute settlement.¹⁶ The question, therefore, is whether we are to discuss and assess novel institutions against only the criteria and experience of existing bodies, or shall we also account for and appreciate the foregoing bodies in new light. The present discussion should also be read in light of the question of whether we duly value difference and particularity, in times of emphasizing convergence and harmonization across human rights treaties and the jurisprudence of international courts and bodies.¹⁷

The following analysis is structured in three parts. The second part elucidates the meaning of the qualifications attached to the ACtHPR's jurisdiction as *per* Article 3(1) of the Protocol to the ACHPR. The meaning of a 'human rights treaty' presents itself with some surprising difficulties. The construction of the Court's jurisdiction needs to be cautiously grounded in the text of its constitutive instruments while, concurrently, limitations on the ACtHPR's jurisdiction cannot be presumed to exist, given the Court's obligation to fulfill its mandate. The third part of this analysis critically assesses the arguments that the Court's broad jurisdiction leads to 'jurisprudential chaos'. This vague claim is tied to three concrete legal issues: first, the anxiety of forum shopping; second, the anxiety that the ACtHPR—a regional and specialized international court—monitors other human rights treaties; and, third, the anxiety of undermining African human rights law, by either risking its specificity or by fragmenting it. I argue that these concerns are over-emphasized. The discussion underlines the shifting authority of specialized and/or regional courts; the need not to overstress but to appreciate positively instances of divergence; and the consideration of new conceptual and geographical *topoi*, in which international law is to be found and produced.

Still, some of the legal issues raised regarding the ACtHPR's wide jurisdiction contain merit. Interestingly, the case law of the ACtHPR suggests that it may be developing a policy of judicial self-restraint by not examining all of the claims submitted by applicants regarding violations of other human rights treaties. Procedural economy, the Court's competence in shaping the subject of a dispute and the possibility of making a choice of applicable law are distinct bases upon which propriety considerations could be introduced to the exercise of the Court's jurisdiction. Finally, the risk of undermining the specificity of African human rights law is a valid concern but it is shown that this risk is more likely to materialize not as a result of the ACtHPR's broad jurisdiction, but in the context of the interpretation process.

15 The Economic Community of West African States Community Court of Justice and the Arab Court on Human Rights share this feature with the ACtHPR. According to Article 16(1) of the Statute of the Arab Court of Human Rights (which has not yet started to function), the Court has jurisdiction 'over all suits and conflicts resulting from the implementation and interpretation of the Arab Charter of Human Rights, or any other Arab convention in the field of Human Rights involving a member State' (emphases added; unofficial translation), adopted by the Council of the League of Arab States, Ministers of Foreign Affairs during its 142nd session by Resolution 7790, available at: www.acihl.org [last accessed 17 March 2019].

16 Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2 *Journal of International Dispute Settlement* 241 at 248.

17 See, for example, Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (2016); and Çali, Madsen and Viljoen, 'Comparative Regional Human Rights Regimes: Defining a Research Agenda' (2018) 16 *International Journal of Constitutional Law* (Special Issue, Symposium on Comparing Regional Human Rights Regimes) 128.

The article concludes by underlining that we cannot conceptualize the new and novel according to the standards of the old and prevalent. It is not only that we need to think anew about a different international court—the ACtHPR. Conversely, the ACtHPR is also an invitation to rethink how we approach both old and new international courts and to pave new ways forward in international judicial settlement.¹⁸

2. CLARIFYING THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS' JURISDICTION TO INTERPRET AND APPLY OTHER HUMAN RIGHTS TREATIES

The preparatory work of the Protocol to the ACHPR does not give any indication of why the Court was entrusted with such a broad mandate to interpret and apply other human rights treaties.¹⁹ Given the lengthy negotiations over the creation of the Court dating back to the 1960s,²⁰ it is unlikely that Article 3 of the Protocol to the ACHPR was a mistake in the drafting stage.²¹ This conclusion is also supported by the equally wide jurisdiction accorded to the African Court of Justice and Human Rights, which will merge in the future with the African Court on Human and Peoples' Rights.²² The drafters, perhaps, thought that the requirement to make a separate optional declaration accepting the Court's competence (under Article 34(6) of the Protocol to the ACHPR) balanced out the Court's unusually broad jurisdiction. Thirty out of 54 African States have ratified the Protocol to the ACHPR,²³ and nine thus far (Burkina Faso, Malawi, Mali, Tanzania, Ghana, Côte d'Ivoire, Benin, Tunisia and The Gambia) have consented to the Court's competence to receive complaints from individuals and non-governmental organizations.²⁴

This section argues that the text of Article 3(1) of the Protocol to the ACHPR leaves little room to question the Court's material jurisdiction to decide complaints regarding an alleged violation of a human rights treaty in Africa (regional or sub-regional) or at the UN level.²⁵ Various arguments have been put forward to limit the Court's mandate to hear such complaints, but a restrictive construction of the Court's jurisdiction *ratione*

18 Murray perceptively criticizes how international lawyers have failed to focus on and use African institutions as positive examples in human rights law and international adjudication: see Murray, 'International Human Rights: Neglect of Perspectives from African Institutions' (2006) 55 *International & Comparative Law Quarterly* 193.

19 Viljoen, *supra* n 7 at 439.

20 For a brief historical overview, see Krisch, 'The Establishment of an African Court on Human and Peoples' Rights' [1998] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 713 at 716-7.

21 Viljoen, *supra* n 7 at 439 n 185, suggests this.

22 See *supra* n 14. The Protocol to the ACHPR was replaced by the Protocol on the Statute of the African Court of Justice and Human Rights on 1 July 2008, which merges the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one single court. However, the Protocol to the Statute of the African Court of Justice and Human Rights has not yet entered into force: see, in general, Viljoen, *supra* n 7 at 435-9. Article 28 reads: 'All legal disputes concerning, among others, the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights ratified by the States Parties concerned; any question of international law.'

23 See: www.african-court.org [last accessed 16 March 2019].

24 Rwanda withdrew its 2013 declaration in February 2016. The withdrawal took effect in March 2017, see: www.african-court.org [last accessed 16 March 2019].

25 Cf. Article 16(1) of the Statute of the Arab Court of Human Rights, which refers only to 'any other Arab convention in the field of human rights' (emphasis added).

materie cannot be presumed, since this would prevent the Court from discharging its role.

A. The Meaning of a ‘Human Rights Instrument Ratified by the States Concerned’

Article 3(1) of the Protocol to the ACHPR clearly stipulates that the Court may exercise its jurisdiction over any other relevant human rights instrument insofar as it is *ratified* by the State(s) concerned. Applicants have brought complaints regarding alleged violations of the Universal Declaration on Human Rights (UDHR) 1948, even though the UDHR is not a treaty.²⁶ The Court has treated such complaints inconsistently. Although the Court in *Tanganyika Law Society* did not rule out the possibility of examining such complaints,²⁷ it subsequently maintained that it lacked jurisdiction to entertain a claim concerning an alleged breach of the UDHR, although the UDHR can be used as a source of inspiration for interpreting the Charter.²⁸ However, in 2018 the Court found that the deprivation of the applicant’s nationality was contrary to Article 15(2) of the UDHR, and it declared a violation in the operative provisions of its judgment.²⁹

B. The Meaning of the Qualifications ‘States Concerned’ and ‘Relevant’

An argument raised with regard to limiting the material jurisdiction of the Court concerns the construction of the qualification ‘instrument ratified by *the States concerned*’ (emphasis added) as referring to instruments ratified by *all* parties to the Protocol to the ACHPR, and not only by the respondent State before the Court.³⁰ This idea cannot be supported by reference to the Court’s constitutive instruments. A careful reading of the Protocol demonstrates that the expressions ‘State(s) concerned’³¹ and ‘States parties to the Protocol’³² are employed in different ways—even within the context of a single provision (for example, Article 25). If Article 3(1) had meant to set the requirement that all State parties to the Protocol need to have ratified a human rights treaty, this would have been stated explicitly.

It has also been suggested that the term ‘relevant’ concerns only treaties that explicitly provide in their text that they are subject to the Court’s jurisdiction.³³ This suggestion, however, is refuted by the fact that neither the African Charter nor the Protocol point in this direction; additionally, the ordinary meaning of the term ‘relevant’ refers to

26 For example, ACtHPR, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples’ Rights Movement v Burkina Faso* Application No 013/2011, 28 March 2014. A list of all judgments of the ACtHPR is available at: www.african-court.org [last accessed 16 March 2019].

27 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* Application Nos 009 and 011/2011, 14 June 2013, at para 122.

28 ACtHPR, *Frank David Omary and Others v The United Republic of Tanzania* Application No 001/2012, 28 March 2014 at paras 19, 72–73.

29 ACtHPR, *Anudo Ochieng Anudo v United Republic of Tanzania* Application No 012/2015, 22 March 2018 at paras 88, 132(v).

30 Viljoen, *supra* n 7 at 438. The Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC) would still fall under the Court’s jurisdiction.

31 Article 7 (sources of law), Article 3 (jurisdiction), Article 25, Article 26 Protocol to the ACHPR.

32 Article 12, Article 25(1), Article 30, Article 35(1) Protocol to the ACHPR.

33 Heyns, *supra* n 7 at 168.

the subject matter of the complaint brought before the Court and the human rights involved therein.³⁴ This, of course, does not answer the question of how one is to determine which human rights treaties are relevant. Although the meaning of the term 'relevant' appears to be uncomplicated, this is misleading.³⁵ For purposes of the present discussion, it suffices to underline that it can be a burdensome task for the Court to research systematically all possible relevant human rights treaties in every single case. The applicants' claims and submissions can be useful in this regard.

C. Back to the Basics: What is a Human Rights Treaty (within the Meaning of Article 3 Protocol to the ACHPR)?

Certain qualifications attached to the Court's contentious jurisdiction under Article 3 of the Protocol to the ACHPR may appear straightforward, but they are surprisingly challenging. This is the case with the expression 'human rights treaty'. The Court had the opportunity early on in its case law to interpret and apply treaties whose *human rights* classification was in dispute. In *Tanganyika Law Society*, the respondent State, Tanzania, argued that the 1993 Revised Treaty of the Economic Community of West African States³⁶ is not a human rights treaty within the meaning of Article 3 of the Protocol and, therefore, it did not fall in the Court's jurisdiction. The Court's judgment did not address Tanzania's objection. However, the former Vice-President of the Court, Fatsah Ouguergouz, devoted the greater part of his Separate Opinion to this issue.³⁷ The main thrust of the Vice-President's position was that the Court should have drawn a distinction between treaties which mainly dealt with the protection of human rights *and* treaties which addressed other matters but contained provisions relating to human rights. Treaties of the latter category placed obligations on State parties without necessarily according subjective rights to individuals.³⁸

The Court scrutinized the matter of the meaning of a 'human rights treaty' in *Actions pour la protection de droits de l'homme*.³⁹ In this, the pressing question was whether the African Charter on Democracy, Elections and Governance⁴⁰ and the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management and Resolution⁴¹ were human rights instruments within the meaning of Article 3 of the Protocol to the ACHPR.⁴² According to the Court, this question should be answered by examining the purpose(s)

34 Cf. the use of the term 'relevant' in Articles 5 and 31 (3)(c) Vienna Convention Law Treaties 1969, 1155 UNTS 331, in which it refers to the subject matter of a treaty or a treaty provision: see Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) at 433.

35 For detailed discussion on how the ECtHR has (not) addressed in its case law the issue of what rules of international law are relevant, see Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28 *Leiden Journal of International Law* 863 at 876-9.

36 1993, 2373 UNTS 233 ('ECOWAS Revised Treaty').

37 *Tanganyika Law Society*, supra n 27 at Separate Opinion of Vice-President Fatsah Ouguergouz, para 1.

38 Ibid. at para 15.

39 ACtHPR, *Actions pour la protection des droits de l'homme (APDH) v Republic of Cote d'Ivoire* Application No 001/2014, 18 November 2016.

40 30 January 2007 ('African Charter on Democracy'), available at: au.int/en/treaties/african-charter-democracy-elections-and-governance [last accessed 16 March 2019].

41 Protocol A/SP1/12/01 (2001) ('ECOWAS Democracy Protocol').

42 *Actions pour la Protection des Droits de l'Homme*, supra n 39 at para 49.

of these treaties. Such purposes 'are reflected either by an express enunciation of the subjective rights of individuals or by mandatory obligations on State parties for the consequent enjoyment of the said rights.'⁴³ The conclusion was that these treaties qualified as human rights treaties because the State parties' obligation to establish independent and impartial electoral bodies is aimed at implementing the human rights provided under the ACHPR.⁴⁴ This reasoning is tenuous, and prompts the following observations.

First, it is not clear from *Actions pour la Protection de Droits de l'Homme* how the Court inferred that States' obligations under these two treaties are aimed at implementing rights guaranteed in the ACHPR. The ECOWAS Democracy Protocol furnishes no obvious link with human rights, either in the preamble or in its main text. The African Charter on Democracy does contain certain references to the promotion of human rights in connection with good governance and democracy, although these references are vague.⁴⁵ Moreover, even though States parties to the African Charter on Democracy have undertaken the obligations to implement it in accordance with respect for human rights and democratic principles (Article 3(1)) and to ensure that citizens enjoy human rights (Article 6), there is no specific mention of the ACHPR or human rights, such as the right to political participation. There is little, if any, evidence to substantiate the ACHPR's position that the obligation incumbent on State parties to the African Charter on Democracy to establish independent and impartial electoral bodies is aimed at implementing human rights under the ACHPR. The commitment of the State parties to the African Charter on Democracy to hold regular, transparent, free and fair elections (Article 17), and to implementing the said Charter in accordance with the principle of effective participation of citizens in democratic and development processes and in the governance of public affairs (Article 3(7)), are not compelling arguments in themselves either.

Second, even if the Court's conclusion were sound and well reasoned, the fact that a treaty and/or a treaty provision was intended to implement a human right is not, on its own, a determinative criterion for establishing that a given treaty is a human rights treaty. For instance, if a bilateral investment treaty implements aspects of the right to property, does this make it a human rights treaty within the meaning of Article 3 of the Protocol to the ACHPR?

Third, in *Actions pour la protection des droits de l'Homme*,⁴⁶ the Court cross-referenced the *Mathieu-Mohin and Clerfayt v Belgium*⁴⁷ judgment of the ECtHR, which reached a similar conclusion with respect to Article 3 of Protocol No 1 to the ECHR

43 Ibid. at para 57.

44 Ibid. at para 63. See also the arguments put forward by the African Institute for International Law, *ibid.* at paras 53-4, when asked by the Court to give its legal view on the issue.

45 The fifth preambular paragraph states that the Member States of the AU are '[c]ommitted to promote the universal values and principles of democracy, good governance, human rights and the right to development'. Article 2(1) reads 'The objectives of this Charter are to: . . . Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights'. Article 4(1) reads: 'State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.'

46 Supra n 39 at para 64.

47 Application No 9267/81, Merits, 2 March 1987 (Plenary). Article 3 of Protocol No 1 to the ECHR 1952, ETS 009, reads: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

(Article 3 AP1). *Mathieu-Mohin and Clerfayt* concerned the question of whether Article 3 P1 gave rise to individual rights that are automatically conferred on everyone, or gave rise only to obligations between States.⁴⁸ Thus, the ECtHR in *Mathieu-Mohin and Clerfayt* and the ACtHPR in *Actions pour la protection de droits de l'homme* may have reached the same conclusion, but the text of the treaties concerned and the Courts' reasoning differ substantially. In contrast to the ACtHPR's reasoning, the ECtHR showed clear evidence confirming that Article 3 P1 confers rights on individuals.⁴⁹

Since the ACtHPR has not elucidated questions which go directly to the core of its material jurisdiction in a satisfactory fashion, the meaning of 'human rights treaty' in the context of Article 3 of the Protocol merits further discussion. The analysis below highlights criteria that are more concrete by drawing a distinction between treaties whose main purpose is the protection of human rights and treaties that contain provisions relating to human rights although this is not their main purpose.

(i) *A treaty whose main purpose is the protection of human rights*

A valid starting point for a discussion of the meaning of 'human rights treaty' under Article 3 of the Protocol to the ACHPR is to examine the object and purpose of a given treaty. A treaty may have more than one object and purpose.⁵⁰ The purpose of a treaty refers to its *raison d'être*—the reason(s) it was created in the first place—whereas the object of a treaty refers to the reciprocal exchange of rights and obligations among parties to the treaty.⁵¹ If the protection of human rights is a treaty's main purpose (or one of its main purposes), the treaty falls under the ACtHPR's jurisdiction *ratione materiae* (subject, of course, to the other qualifications set out in Article 3 of the Protocol to the ACHPR).

(ii) *The object of a treaty: A treaty whose main purpose is not the protection of human rights but contains provisions relating to human rights*

The next question is whether a treaty can be regarded as a human rights treaty for the purposes of Article 3 of the Protocol to the ACHPR even if its main purpose is not the protection of human rights.⁵² The ACtHPR, in *Actions pour la Protection de Droits de l'Homme*, stated that if a treaty provision expressly confers subjective rights on individuals, or if such rights derive from obligations incumbent on States, then this treaty falls under its jurisdiction. The IACtHR's approach lends further support to the position. The IACtHR, in the Advisory Opinion '*Other Treaties*' Subject to the Consultative Jurisdiction of the Court, was asked to clarify its advisory function with

48 Ibid. at para 48.

49 Ibid. at para 49. Article 5 P1 provides that the provisions of its Articles 1, 2, 3 and 4 shall be regarded as additional Articles to the ECHR. The ECtHR also highlighted that Article 3 P1 is of great importance to fulfilling the aim of the ECHR as reflected in the Preamble, according to which fundamental human rights are best maintained by an effective political democracy: see *ibid.* at para 47.

50 Villiger, *supra* n 34 at 427.

51 Ibid. at 248-9; Boisson de Chazournes, La Rosa and Moise Mbengue, 'Article 18' in Corten and Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (2011) 369 at 383-8.

52 Viljoen, *supra* n 7 at 436.

regard to interpreting 'other treaties concerning the protection of human rights in the American states'.⁵³ It opined that a treaty is subject to its advisory jurisdiction as long as it contains provisions concerning human rights, even if the protection of human rights is not one of that treaty's main purposes.⁵⁴ Nonetheless, the pronouncements of the IACtHR should be appreciated with the caveat that the IACtHR endowed itself with a wide jurisdiction in the exercise of its advisory function.⁵⁵ One should therefore be cautious about 'transplanting' the ACtHPR's reasoning adopted in the exercise of its advisory jurisdiction when discussing its contentious jurisdiction.⁵⁶

Turning now to the precise criteria for determining when such a treaty can be regarded as a human rights treaty, certain scholars have asserted that even when a treaty is not a human rights treaty, it may still have a human rights dimension or human rights implications.⁵⁷ Similarly, the IACtHR held that it is empowered to invoke any treaty insofar as it has a bearing upon, affects or is of interest to the protection of human rights.⁵⁸ But how is one to establish and assess such human rights implications, or the human rights dimensions of a non-human rights treaty? Almost any treaty, including a trade agreement, has certain implications concerning human rights. Is this a sufficient basis for the ACtHPR to exercise jurisdiction over such treaties? If one follows this line of thought, the ACtHPR could, in practice, hear complaints regarding alleged violations

53 According to Article 64(1) IACHR, 'The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.'

54 OC-1/82, 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Article 64 American Convention on Human Rights) IACtHR Series A 1 (1982) at para 11; OC-16/99, *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law* IACtHR Series A 16 (1999) at paras 72, 76.

55 *The Right to Information on Consular Assistance*, *ibid.* at Concurring Opinion of Judge Cancado Trindade, para 29.

56 Although this article focuses only on the contentious jurisdiction of the ACtHPR, the present analysis regarding the meaning of 'human rights treaty/instrument' applies also to the Court's advisory function. According to Article 4(1) Protocol to the ACHPR 'the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments.' However, the Court in two different orders relating to separate requests for an advisory opinion on the same legal questions adopted a very restrictive construction of its advisory function: see ACtHPR, Request No 1/2015, *Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, Order, 29 November 2015 at para 18; ACtHPR, Request No 1/2014, *Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, Order, 5 June 2015 at para 13. The Court's laconic reasoning does not give a satisfactory answer as to why the issues raised by the authors do not qualify as a legal matter relating to the Charter. In these instances, one would not even have to address the question of whether the Rome Statute of the International Criminal Court (ICC) 1998, 2187 UNTS 38544 is a human rights instrument; demonstrating that States' obligations under the ICC Statute raise legal issues *vis-à-vis* the ACHPR would arguably suffice. Cf. Viljoen, *supra* n 11 at 91-3 and in *Request No 1/2015 for Advisory Opinion* at Dissenting Opinion of Judge Fatsah Ouguergouz, para 17-2.

57 Naldi and Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431 at 435, n 26; Van Der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113 at 119-20, n 46; Heyns, *supra* n 7 at 167.

58 *The Right to Information on Consular Assistance*, *supra* n 54 at paras 72, 76.

of a potentially unlimited number of treaties. Consequently, the foregoing considerations are not particularly helpful, since they establish only a tenuous connection with the concept of a human rights treaty. One way forward is to focus on the object of the treaty by relying on specific treaty provisions, rather than on a treaty's human rights implications in the abstract.⁵⁹

The matter is straightforward when a treaty contains provisions which confer direct entitlements and claims on individuals. However, this does not necessarily mean that these individual rights also qualify as human rights. A relevant example is the interpretation of Article 36(1) of the Vienna Convention on Consular Relations (VCCR),⁶⁰ which concerns the privileges relating to a consular post and, in particular, issues of communication and contact with nationals of the sending State who are in prison, custody or detention. The International Court of Justice (ICJ) in the *LaGrand* case,⁶¹ having found that Article 36 of the VCCR confers rights on individuals, concluded that those rights are not human rights. The ICJ reaffirmed in an *obiter dictum* in the *Avena* case⁶² that neither the text, nor the object and purpose of the VCCR, nor any indication in the *travaux préparatoires* supported the argument that the VCCR confers human rights on individuals. Interestingly, the IACtHR, in *The Right to Information* Advisory Opinion, found that the rights contained in Article 36 of the VCCR are human rights.⁶³ Therefore, there are instances in which it is not clear whether individual rights are human rights.

It can be equally difficult to assess whether or not a treaty that imposes specific obligations on State parties confers specific rights and claims on individuals. Even if the fulfilment of these obligations leads to the enjoyment of specific rights and individuals benefit from the application of a treaty,⁶⁴ it does not always follow that individuals derive these rights. States may undertake to comply with treaty obligations in relation to individuals without conferring direct entitlements on them.⁶⁵ This is a matter to be decided on a case-by-case basis by ascertaining the object of the treaty and interpreting the exchange of rights and obligations among State parties. A relevant example is whether the African Union Convention on Preventing and Combating Corruption⁶⁶ confers rights on individuals and, consequently, whether it can be considered a human rights instrument according to Article 3 of the Protocol to ACHPR. It has been argued

59 Viljoen, *supra* n 7 at 436-8.

60 1963, 596 UNTS 261.

61 *LaGrand (Germany v United States of America)* Merits, Judgment, ICJ Reports 2001, 466 at para 78.

62 *Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)* Merits, Judgment, ICJ Reports 2004, 12 at para 124.

63 *The Right to Information on Consular Assistance*, *supra* n 54 at paras 83-4, 85-7.

64 *Actions pour la Protection des Droits de l'Homme (APDH)*, *supra* n 39 at para 57.

65 *Case concerning Avena and Other Mexican Nationals*, *supra* n 62 at para 139. See also Simma, 'Human Rights Treaties' in Besson and d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (2017) 872 at 879-81. Another example is the question of whether an individual can derive the rights to a remedy and reparations from Article 4 CAT which, in principle, seems to prescribe only obligations upon State parties. For the evolving interpretation of Article 4 CAT, see Nowak and McArthur, *The United Nations Convention Against Torture: A Commentary* (2008) at 250-2.

66 11 July 2003, available at: au.int/en/treaties/african-union-convention-preventing-and-combating-corruption [last accessed 16 March 2019] ('AU Convention on Corruption').

that although provisions of the AU Convention on Corruption are framed mostly as obligations placed on States, these obligations correspond to rights that can be claimed by individuals.⁶⁷ At first glance, the protection of human rights does not appear to be one of the main purposes of the AU Convention on Corruption. The preamble contains references to 'removing obstacles to the enjoyment of economic, social and cultural rights' (eleventh paragraph), and the explicit reference to respect for human rights and the Charter (fourth paragraph). Nonetheless these references are very vague, and more importantly they do not establish the promotion of human rights as one of the purposes of the AU Convention on Corruption. It is rather the promotion of socio-economic development, which, in turn, is supported by the removal of obstacles to the enjoyment of human rights.⁶⁸ Still, there are indications that the object of the treaty furnishes a link to human rights. Pursuant to Article 3(2), State parties to the AU Convention on Corruption undertake to respect human and peoples' rights in accordance with the ACHPR and other relevant human rights instruments. More specifically, Articles 13(3) and 14 provide the right to a fair trial, and Article 12(4) provides aspects of the right to freedom of expression. However, with the exception of these two rights one cannot make a convincing argument for inferring, in general, individual rights from State obligations enshrined in the AU Convention on Corruption.

To conclude, Article 3(1) of the Protocol to the ACHPR does not leave much room to question the Court's jurisdiction to decide complaints concerning other human rights treaties. Despite the arguments that have been put forward in international law scholarship, one cannot presume a restrictive construction of the Court's jurisdiction *ratione materiae*. A more systematic and rigorous examination of the meaning of 'human rights treaty' is expected of the Court, especially since this is a prerequisite to exercise its material jurisdiction. When a treaty does not have the protection of human rights as one of its main purposes, a vague discussion concerning the human rights implications or dimension of that treaty is not informative in practice. The focus should rather be placed on the object of the treaty and specific treaty provision(s) in order to examine, first, whether a treaty provision that imposes specific obligations on States confers specific rights on individuals and, second, whether such individual rights qualify as human rights.

3. THE ANXIETY OF 'JURISPRUDENTIAL CHAOS'

Despite strong concerns encouraging the Court to refrain from exercising its jurisdiction over human rights treaties ratified by African States⁶⁹ or to tailor its mandate to the narrow scope of the jurisdiction of the African Commission on Human and Peoples' Rights ('the Commission' or AComHPR) examining only alleged violations

67 Viljoen, *supra* n 7 at 436.

68 According to Article 2(4), one of the objectives of the Convention is to 'promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.'

69 For example, Heyns, *supra* n 7 at 168.

of the ACHPR,⁷⁰ the ACtHPR has proceeded to fully explore the scope of its material jurisdiction. Having discussed the meaning of the qualifications attached to the Court's jurisdiction, this section addresses scholars' fears, namely that allowing complaints of violations of a variety of human rights treaties to be brought before the Court will lead to 'jurisprudential chaos'.⁷¹ Jurisprudential chaos is a vague claim. The analysis in this section ties this claim to three concrete legal issues underpinning the debate: first, the anxiety of forum shopping in light of the multiplicity of international courts; second, the anxiety of the ACtHPR monitoring other human rights treaties; and third, the anxiety of threatening African human rights law. The analysis finds that the jurisprudential chaos claim generally reflects an anxiety associated with repeatedly exaggerated concerns regarding the limits of the jurisdiction of regional and/or specialized international courts, and the ensuing risks to interpreting and developing international law. However, some of the concerns raised merit further discussion.⁷² The case law of the Court suggests that it may be developing a policy of judicial self-restraint by not examining all of the submissions of the applicants regarding violations of other human rights treaties. The case law of the ECCJ is also brought into specific aspects of the discussion below, in order to shed some light on the ACtHPR's practice.

A. The Anxiety of Forum Shopping

The subject matter jurisdiction of the ACtHPR allows applicants to submit complaints regarding alleged violations of other human rights treaties in any of the following (non-exhaustive) scenarios:

- a) An applicant may bring a case claiming a violation of a right which is not protected under the ACHPR but is envisaged by another treaty ratified by the State concerned, such as the right to housing under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷³
- b) An applicant may rely on and allege a breach of a right which, although envisaged in the ACHPR, is formulated in another treaty in a manner that ensures a higher level of protection. This may be due to a broader protective scope of this right,

70 Viljoen, *supra* n 7 at 438. According to Article 2 ACHPR and Article 8 Protocol to the ACHPR, the African Court complements the protective function of the Commission. However, pursuant to Rule 29 of the Rules of Procedure of the Court (April 2010), this complementary relationship has no impact on the scope of the complaint, the Court's jurisdiction or the laws applicable when the Commission refers a case to the Court. Moreover, if this line of reasoning were to be followed, it would also entail different treatment of applications before the Court depending on whether a case had been referred by the Commission or submitted by other parties in accordance with Article 5 of the Protocol to the ACHPR.

71 Heyns, *supra* n 7 at 167.

72 Van der Mei, *supra* n 57 at 119-20; Krisch, *supra* n 20 at 722-4.

73 1966, 993 UNTS 3.

or a more restricted limitation attached thereto.⁷⁴ *Lohé Issa Konaté*⁷⁵ is a case in point.

- c) An applicant may claim a violation of a human right which is protected in the same way under both the ACHPR and another treaty, but no mechanism is envisaged or is available to the applicant under that other treaty. For example, many cases have already been brought against Tanzania with regard to violations of the International Covenant on Civil and Political Rights (ICCPR),⁷⁶ since Tanzania has not ratified the first Optional Protocol to the ICCPR.⁷⁷
- d) Finally, an applicant may choose to bring a complaint before the ACtHPR (instead of or in addition to another international body) as part of a litigation strategy (for example, considerations of physical proximity to a forum and litigation costs).⁷⁸

The Court's case law demonstrates that applicants are familiar with the claims and arguments that they can raise in connection with other human rights treaties. The Court has examined alleged violations of a series of treaties, including the ICCPR,⁷⁹ the ICESCR,⁸⁰ the ECOWAS Revised Treaty,⁸¹ the African Charter on Democracy,⁸² the ECOWAS Democracy Protocol,⁸³ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁸⁴ the Protocol to the African Charter on

74 Mbondenyei, 'Invigorating the African System on Human and Peoples' Rights through Institutional Mainstreaming and Rationalisation' (2009) 27 *Netherlands Quarterly of Human Rights* 451 at 470; Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 *Yale Human Rights & Development Law Journal* 45 at 91.

75 ACtHPR, *Lohé Issa Konaté v Burkina Faso* Application No 004/2013, 5 December 2014. See also ACtHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda* Application No 003/2014, 24 November 2017 at paras 133, 136, 140 (confirming the *Lohé Issa Konaté* case).

76 1966, 999 UNTS 171.

77 *Tanganyika Law Society*, supra n 27; ACtHPR, *Alex Thomas v United Republic of Tanzania* Application No 005/2013, 20 November 2015; ACtHPR, *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania* Application No 006/2013, 18 March 2016; ACtHPR, *Mohamed Abubakari v United Republic of Tanzania* Application No 007/2013, 3 June 2016; *Frank David Omary and Others*, supra n 28.

78 Viljoen, supra n 7 at 438; Helfer, 'Forum Shopping for Human Rights' (1999) 48 *University of Pennsylvania Law Review* 285.

79 *Tanganyika Law Society*, supra n 27 at para 76; *Lohé Issa Konaté*, supra n 75 at para 9; *Alex Thomas*, supra n 77; *Mohamed Abubakari*, supra n 77; *Actions pour la Protection des Droits de l'Homme*, supra n 39; *Abdoulaye Nikiema and Others*, supra n 26.

80 *Frank David Omary and Others*, supra n 28 at para 76; ACtHPR, *African Commission on Human and Peoples' Rights v Republic of Kenya* Application No 006/2012, 26 May 2017 at para 2.

81 *Lohé Issa Konaté*, supra n 75 at para 12; *Abdoulaye Nikiema and Others*, supra n 26.

82 *Actions pour la Protection des Droits de l'Homme*, supra n 39.

83 Ibid.

84 1979, 1249 UNTS 13. ACtHPR, *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa v Republic of Mali* Application No 046/2016, 11 May 2018 at paras 9, 95, 125, 135.

Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol')⁸⁵ and the African Charter on the Rights and Welfare of the Child.⁸⁶

There are instances in which applicants have submitted violations of other relevant human rights instruments ratified by the States concerned without invoking a violation of the Charter. In the *Frank David Omary and Alex Thomas* cases, the applicants argued a violation of the UDHR without mentioning any right under the Charter. The Court clarified that although it had no jurisdiction over the UDHR, it did have jurisdiction to decide complaints concerning either the Charter or other relevant human rights treaties (or both).⁸⁷ On other occasions, the applicants submitted their complaints without referring to specific treaties. Tanzania, in the *Wilfred Onyango Nganyi and Kennedy Owino Onyachi* cases,⁸⁸ raised preliminary objections *ratione materiae* arguing that the applicants had not invoked any human rights treaties. The Court maintained that the factual basis of the alleged violations was sufficient to ascertain whether the complaints fall within the scope of specific rights under the Charter or other human rights treaties.⁸⁹ In *Kennedy Owino Onyachi*, the Court found, on its own initiative, that the applicants' submissions contained alleged violations of the Charter and the ICCPR (even though the Court did not proceed to discuss the ICCPR on the merits).⁹⁰ This is a sound approach, since questions pertaining to the jurisdiction *ratione materiae* of international courts are examined *proprio motu*.⁹¹ However, in the recent *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes* (APDF) and *The Institute for Human Rights and Development in Africa v Republic of Mali* judgment,⁹² the Court examined and decided alleged violations of other treaties on human rights without bringing the ACHPR into play. It is the first case in which the Court decided a complaint strictly on the basis of other treaties on human rights without implicating the Charter.

It becomes clear that the ACTHPR can be—and, indeed, is—used as a forum for bringing complaints regarding other human rights treaties. The argument against this practice is that the existence and use of multiple venues for adjudicating international (human rights) claims may lead courts to favour approaches to tailor their 'clientele',

85 11 July 2003, adopted by the 2nd Ordinary Session of the Assembly of the African Union (AU), available at: www.achpr.org/instruments/women-protocol/ [last accessed 16 March 2019]. See also *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes*, *ibid.* at paras 9, 78, 95, 115, 125, 135.

86 1990, CAB/LEG/24.9/49. *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes*, *ibid.* at paras 9, 78, 115, 125, 135.

87 *Frank David Omary and Others*, *supra* n 28 at paras 74, 77; *Alex Thomas*, *supra* n 77 at para 45.

88 *Wilfred Onyango Nganyi & 9 Others*, *supra* n 77 at para 52; ACTHPR, *Kennedy Owino Onyachi and Others v United Republic of Tanzania* Application No 003/20015, 28 September 2017 at paras 35–6.

89 *Wilfred Onyango Nganyi & 9 Others*, *ibid.* at paras 57–58; *Kennedy Owino Onyachi and Others*, *ibid.* at paras 35–36, 156–157. See also *Frank David Omary and Others*, *supra* n 28 at paras 74, 77; *Alex Thomas*, *supra* n 77 at para 45; ACTHPR, *Peter Joseph Chacha v United Republic of Tanzania* Application No 003/2012, 28 March 2014 at para 114.

90 *Kennedy Owino Onyachi and Others*, *supra* n 88 at paras 35–6.

91 Shelton, 'Jura Novit Curia in International Human Rights Tribunals' in Boschiero et al. (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013) 189.

92 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes*, *supra* n 84 at para 135.

and may increase the risk of conflicting judgments.⁹³ Forum shopping has acquired a negative connotation, even though it is at least equally arguable that the term 'forum shopping' is misleading and it does not belong to the lexicon of international law due to the latter's decentralized nature.⁹⁴ Choice of forum is the inevitable consequence of the specialization and deepening of international law coupled with the multiplicity of international courts and other bodies. The multiplicity of international courts embodies the complexity of relations between States (and other actors).⁹⁵ Increasing third-party settlement of international disputes through law-based forums makes (human rights-related) disputes justiciable, and paves the way for authoritative pronouncements of international law. The risk of diverging interpretations of the law is largely exaggerated.⁹⁶ Choice of forum enables creativity through dialogue among courts.⁹⁷ The possibility of multiple international courts being able to hear a dispute (or aspects thereof) not only proves beneficial to the individuals concerned, but also entails a healthy level of competition among courts, thereby improving the quality of their rulings and encouraging them to keep an eye on one another.⁹⁸ It is frequently argued that States could take advantage of differing views of international courts and bodies on human rights by acknowledging the milder view, and the lowest common denominator in human rights protection.⁹⁹ Yet, there is no State practice or precedent to support this claim.¹⁰⁰

93 For example, see Speech by His Excellency Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the General Assembly of the United Nations, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order', 27 October 2000, at 3-4, available at: www.icj-cij.org/en/statements-by-the-president [last accessed 16 March 2019].

94 See in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Merits, Judgment, ICJ Reports 2010, 639 at Separate Opinion of Judge Cançado Trindade, para 240.

95 Brownlie, 'Blaine Sloan Lecture: The Peaceful Settlement of International Disputes in Practice' (1995) 7 *Pace University School of Law International Law Review* 257 at 276.

96 Address to the Plenary Session of the General Assembly of the United Nations by Judge S.M. Schwabel, President of the ICJ, 27 October 1998, at 4, available at: www.icj-cij.org/en/statements-by-the-president [last accessed 16 March 2019].

97 Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *New York University Journal International Law & Policy* 679 at 681-2, 686; Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *New York University Journal International Law & Policy* 919 at 925; Brownlie, *supra* n 95; Murungi and Gallinetti, 'The Role of Sub-Regional Courts in the African Human Rights System' (2010) 13 *SUR—International Journal on Human Rights* 119 at 131.

98 Pauwelyn and Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 42 *Cornell International Law Journal* 77 at 80; Brownlie, *ibid.* at 276; Meron, *Human Rights Law-making in the United Nations* (1986) at 241.

99 For instance, Meron, *ibid.*

100 Helfer, *supra* n 78 at 357-8. Helfer correctly highlights the fact that a State would not be able to pursue the lowest denominator among different rulings and interpretations by different courts and bodies since, in most cases, human rights treaties contain a more favourable protection clause preventing States from restricting the enjoyment or exercise of any right or freedom recognized in treaty A by virtue of another treaty. Interestingly, this does not apply in the case of the ACHPR since the African Charter is one of the very few human rights treaties which does not contain a more favourable protection clause. However, if a State party to the Charter is also a party to another human rights treaty containing such a clause, then that State would be obliged not to invoke a lower level of protection with regard to its obligations under that treaty. For examples of more favourable protection clauses, see Article 5(2) ICCPR, Article 5(2) ICESCR and Article 41 CRC.

There is little evidence regulating the phenomenon of bringing multiple claims over the same or a similar matter, successively or simultaneously, before different bodies.¹⁰¹ In the absence of explicit regulation of choice of forum by States (for example, by inserting a specific treaty clause), States and individuals may exercise all options available to them, including choice of forum, simultaneous petitioning and successive petitioning.¹⁰² The ACHPR is interpreted as allowing all these options, with the exception of cases that have been settled by the States involved (Article 56(7) ACHPR).¹⁰³ This suggests that the admissibility criterion requires not only the finality of the settlement, but also settlement on an inter-State level (thereby excluding claims by individuals against the State).¹⁰⁴ Moreover, successive petitioning concerning claims under the ICCPR is permitted; it is allowed if the Human Rights Committee (HRC) is satisfied that the *same matter* is not being examined under another procedure *concurrently*.¹⁰⁵

B. The Anxiety of Monitoring Other Human Rights Treaties

The ACTHR systematically applies, and finds violations of, other human rights treaties, including regional, sub-regional and global. It also monitors their implementation, and orders the respondent States to comply with their respective obligations. Some examples from the case law are the following. In *Lohé Issa Konaté*, the Court found that Burkina Faso's Penal Code (prescribing custodial and non-custodial sentences for defamation), as well as the sentencing of the applicant to imprisonment and excessive fines, were contrary not only to the requirements of Article 9 of the Charter but also to Article 19 of the ICCPR and Article 66(2)(c) ECOWAS Revised Treaty concerning the rights of journalists.¹⁰⁶ In another 2017 freedom of expression case, Rwanda was held in violation of both Article 9(2) of the Charter and Article 19 of the ICCPR.¹⁰⁷ In *Actions pour la protection des droits de l'homme*, the Court proclaimed that Côte d'Ivoire violated its obligations both to establish impartial and independent electoral bodies and to provide equal protection under the law, as enshrined in Article 3 of the ACHPR, Articles 10(3) and 17 of the African Charter on Democracy, Article 3 of ECOWAS Democracy Protocol and Article 26 of the ICCPR.¹⁰⁸ Côte d'Ivoire was ordered to bring its domestic law in compliance with the requirements of these treaties. In *Anudo Ochieng Anudo*, Tanzania was found to have arbitrarily expelled the applicant in violation of Article 7 of the Charter and Article 14 of the ICCPR.¹⁰⁹ In a different

101 Lowe, 'Overlapping Jurisdictions in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191 at 201; Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2004).

102 Helfer, *supra* n 78 at 304.

103 Article 56(7) ACHPR sets as an admissibility requirement that 'communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they . . . do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter' (emphasis added).

104 Helfer, *supra* n 78 at 306.

105 Article 5(2)(a) Optional Protocol to the ICCPR 1996, 999 UNTS 171, reads: 'The Committee shall not consider any communication from an individual unless it has ascertained that . . . the same matter is not being examined under another procedure of international investigation or settlement.'

106 *Lohé Issa Konaté*, *supra* n 75 at paras 164, 167, 170, 176.

107 See also *Ingabire Victoire Umuhoza*, *supra* n 75 at paras 163, 173(ix).

108 *Supra* n 39 at paras 135, 151.

109 *Anudo Ochieng Anudo*, *supra* n 29 at paras 106, 132(vii).

cluster of cases, Tanzania's systematic failure to protect various aspects of the right to a fair trial led to a violation of Article 7 of the ACHPR and Article 14 of the ICCPR.¹¹⁰ In 2018, the domestic legislation of the Republic of Mali was found to be inconsistent with the State's obligations under CEDAW,¹¹¹ the Maputo Protocol¹¹² and the African Charter on the Rights and Welfare of the Child.¹¹³ The Court ordered the Republic of Mali to amend its domestic law in conformity with the standards set by the foregoing treaties.

It is worthwhile to note that the ECCJ, in tune with the ACtHPR, construes its material jurisdiction to include alleged violations of the UDHR¹¹⁴ and UN human rights treaties to which ECOWAS Member States are parties,¹¹⁵ such as the ICCPR,¹¹⁶ the ICESCR,¹¹⁷ the Convention Against Torture (CAT)¹¹⁸ and CEDAW.¹¹⁹ The *SERAP* case is the only instance in which a State challenged the ECCJ's jurisdiction *ratione materiae*.¹²⁰ Nigeria argued that the ECCJ did not have jurisdiction to adjudicate on alleged violations of the ICCPR and ICESCR because, first, the Nigerian Constitution

110 The rights to be heard and to defend oneself, to be tried within a reasonable length of time and to free legal aid are enunciated in *Alex Thomas*, supra n 77 at para 124. See also ACtHPR, *Interpretation of the Judgment of 20 November 2015—Alex Thomas v United Republic of Tanzania* Application No 001/2017, 28 September 2017 at paras 38–39. The obligation to provide free legal assistance and to communicate all the elements of the charge to the applicant in a timely manner was enunciated in *Mohamed Abubakari*, supra n 77 at paras 145, 161.

111 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes*, supra n 84 at paras 9, 95, 125, 135.

112 *Ibid.*

113 *Ibid.* at paras 9, 78, 115, 125, 135.

114 ECCJ, *Essien v The Republic of The Gambia and Another* Application No ECW/CCJ/APP/05/05, 14 March 2007 at paras 1 and 11. A list of all judgments by the ECCJ is available at: www.courtecawas.org [last accessed 16 March 2019]. Some of the Court's judgments from 2004 to 2009 are not available on the Court's website. From 2004 to 2009 they have been published in an official reporter (2004–2009 Community Court of Justice ECOWAS Law Report), but it is not widely available, including to the author. Selected decisions are available on other online databases, including the Centre for Human Rights, University of Pretoria, African Human Rights Case Law Database. Unless indicated otherwise, all judgments cited herein are available at the Court's website.

115 ECCJ, *Sikiru Alade v Nigeria* 11 June 2012 (judgment unavailable to the author) as discussed in Ebo-
brah, 'Human Rights Developments in African Sub-Regional Economic Communities during 2012' (2013) 12 *African Human Rights Law Journal* 178 at 203; ECCJ, *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria and Anor* Application No ECW/CCJ/JUD/18/12, 14 December 2012 at para 28.

116 ECCJ, *Pawimondom v Togo* Application No ECW/CCJ/JUD/02/17, 19 February 2018 at 3 (in French only); ECCJ, *Jerome Bougouma and Others v Burkina Faso* Application No ECW/CCJ/JUD/15/17, 19 February 2018 at 3 (in French only); ECCJ, *Nosa Ehanire Osaghae v Nigeria* Application No ECW/CCJ/JUD/20/15, 10 October 2017 at para 3.

117 ECCJ, *Synecoci v Côte d'Ivoire* Application No ECW/CCJ/JUD/39/16, 19 February 2018 at 3 (in French only); *Nosa Ehanire Osaghae*, *ibid.* at para 3.

118 1984, 1465 UNTS 85. See *Pawimondom*, supra n 116 at 3; ECCJ, *Dorothy Chioma Njemanze and 3 Others v Nigeria* Application No ECW/CCJ/JUD/08/17, 12 October 2017 at 2–3.

119 *Dorothy Chioma Njemanze and 3 Others*, *ibid.*; ECCJ, *Mahamoudou and Others v Mali* Application No ECW/CCJ/JUD/39/15, 7 May 2016 at para 20 (in French only); ECCJ, *Koraou v Niger* Application No ECW/CCJ/JUD/08/08, 27 October 2008 at para 28.

120 Supra n 115. See Ebo-
brah, 'Dual Mandate, Carried Authority: The Skewed Authority of the ECOWAS Community Court of Justice' [2016] *iCourts Working Paper Series No. 57* at 12.

recognizes only the jurisdiction of Nigerian courts over the ICCPR and, second, the ICESCR is not justiciable. The ECCJ dismissed the objection by stating that

[B]y establishing the jurisdiction of the Court, [the Member States parties to the Revised Treaty of ECOWAS] have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to.¹²¹

The prospect of UN human rights treaties being justiciable and enforceable by a regional human rights court is a source of uneasiness, to say the least. Entrusting such a task to a regional human rights court is ‘highly unusual’.¹²² Yet, the ACtHPR has clear jurisdiction to apply and monitor UN human rights treaties (if ratified by the State concerned). From a strictly legal point of view, the question of whether a given African State has also consented to the individual communications procedure under a UN human rights treaty is immaterial.¹²³ The same can be said for the ECCJ, which has also been subject to criticism for exercising its jurisdiction over UN treaties.¹²⁴ The ACtHPR’s jurisdiction *ratione materiae* deviates from the ‘prototype’ of the contentious jurisdiction of international courts on human rights, which is typically limited to the interpretation and application of a specific regional treaty. For this reason, the ACtHPR does not sit well within the existing categories of adjudicative bodies¹²⁵ and, consequently, the relevance of arguments concerning other international courts should not be taken for granted when addressing the ACtHPR. The following discussion engages with the question of whether concerns raised with regard to the jurisdiction of the ACtHPR have certain merit or merely project anxieties from dissimilar contexts and, if yes, to what extent.

(i) *Towards an Arusha-based world court on human rights for African States?*

One may argue that, as far as African States are concerned, the ACtHPR functions as a world court on human rights based in Arusha.¹²⁶ Ideas about consolidating human rights monitoring mechanisms into a single judicial body—a World Court on Human Rights—have been debated for decades.¹²⁷ Clearly the design of the ACtHPR is not what was expected by many, but it is an intriguing design in international judicial adjudication. It creates a mechanism which does not consolidate monitoring mechanisms (as the envisaged World Court on Human Rights does), but consolidates human rights

121 SERAP, *supra* n 115 at para 29.

122 Heyns, *supra* n 7 at 167.

123 Cf. Viljoen, *supra* n 7 at 437–8.

124 For example, Ebobrah, *supra* n 115 at 203.

125 Romano, *supra* n 16 at 245. See also Romano, Alter and Shany, ‘Mapping International Adjudicative Bodies, the Issues and Players’ in Romano, Alter and Shany, *supra* n 12, 3 at 9–10.

126 Meron, *supra* n 98. On the recurring theme on the need, desirability and feasibility for a world court on human rights, see Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (2017) at 239–3; Kozma, Nowak and Scheinin, ‘A World Court of Human Rights: Consolidated Draft Statute and Commentary’ (2010), available at: cadmus.eui.eu [last accessed 16 March 2019]; Alston, ‘Against a World Court for Human Rights’ (2014) 28 *Ethics & International Affairs* 197.

127 Meron, *supra* n 98.

obligations of State parties under the auspices of a single judicial body on a regional level. The ACtHPR is 'the judicial arm of the panoply of human rights agreements concluded under the aegis of the United Nations'.¹²⁸ Notably this model is expected to be strengthened, since the future African Court of Justice and Human Rights is entrusted¹²⁹ not only with all legal disputes concerning the interpretation and the application of the Charter and any other legal instruments relating to human rights ratified by the States parties concerned, but also with legal disputes concerning any question of international law.¹³⁰ In this context, three main reasons may be discerned for treating the broad jurisdiction of the ACtHPR as a problem, rather than a welcome variance, in dispute settlement.

The first reason for being distrustful toward the ACtHPR's jurisdiction lies in the authority of a *regional* court to apply, declare violations of and monitor UN treaties.¹³¹ The function of an international court on a regional level or a given geographical area casts doubt onto its relevance at a global level.¹³² An early and characteristic case in point was the Central American Court of Justice. In 1944, Manley Hudson strongly opposed the creation of a regional international court of general jurisdiction, because it would allegedly give rise to 'a particularistic development of international law',¹³³ and it would risk the primacy and universality of general international law.¹³⁴ This mindset is also reflected in the way that scholars and practitioners systematize international courts, dividing them on the basis of their regional and universal jurisdiction, respectively.¹³⁵ However, not everybody currently sees these developments in a negative light.¹³⁶ As

128 Romano, *supra* n 5.

129 According to Article 9 of the Statute of the African Court of Justice and Human Rights, the Protocol to the ACHPR, and the Statute annexed to it, shall enter into force 30 days after the deposit of the instruments of ratification by 15 Member States. Six Member States have ratified thus far, see: www.african-court.org [last accessed 16 March 2019].

130 Article 28 Protocol on the Statute of the African Court of Justice and Human Rights.

131 *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, *supra* n 27 at Separate Opinion of Vice-President Fatsah Ouguergouz, para 16; Mbondenyi, *supra* n 74 at 470.

132 Farrell, 'Distribution' in Schabas and Murphy (eds), *Research Handbook on International Courts and Tribunals* (2017) 337 at 346.

133 Hudson, *International Tribunals: Past and Future* (1944) at 179.

134 *Ibid.* at 179.

135 For example, Tomuschat, 'International Courts and Tribunals', *Max Planck Encyclopaedia of Public International Law* (last updated February 2011); Janis (ed.), *International Courts for the Twenty-First Century* (1992), Parts II and III; French, Saul and White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (2010), Part III; Schermers and Blokker, *International Institutional Law: Unity within Diversity* (2011).

136 For example, Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 *International & Comparative Law Quarterly* 1 at 14-5.

will be discussed below, regional and specialized developments, as well as pronouncements of *all* international courts, inform (general) international law.¹³⁷ This strongly suggests the need for a more nuanced approach regarding the value and relevance of judgments and pronouncements by regional international courts.

A second reason for treating the ACtHPR's jurisdiction as a problematic circumstance rests upon the prevailing view that *specialized* international courts create risks for diverging interpretations of international law. For this reason, specialized international courts should not extend their pronouncements beyond matters which 'do not lie within the specific purview of [their] jurisdiction'.¹³⁸ In the context of the present discussion, this entails that the ACtHPR should refrain from exercising its jurisdiction over other treaties on human rights.¹³⁹ This line of thinking reflects the insistence on underlining the alleged risks posed by international courts entrusted with interpreting, applying and monitoring a specific treaty and/or subject area, because they 'could lead to the destruction of the very foundation of international law'.¹⁴⁰ The main concern is that different interpretations of similar or identical rules of international law can undermine the integrity of general international law, and the overall consistency of international law. This anxiety is all the more pronounced with respect to international courts on human rights, which are typically regional and specialized in scope.¹⁴¹ *Lex regionis* and *lex specialis* have been formulated and developed as conjoined twins, and have defined the identity of (and role served by) human rights courts. Nonetheless, this view disregards first that the concept of divergence is over-emphasized and, second, that the distinction between courts of general jurisdiction and courts entrusted with specialized and/or regional jurisdiction is elusive, if not artificial.¹⁴²

As to the first point on over-emphasizing divergence, it regularly gets overlooked that different interpretations and even divergences qualify as natural and welcome consequences of the nature and function of international law. The starting point of

137 There is no well-established definition of the notion of general international law. According to the International Law Commission (ILC): see Koskeniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission Finalized, A/CN.4/L.682 (2006) at para 493), general international law includes customary international law, general principles of law within the meaning of Article 38(1)(c) of the Statute of the ICJ, and principles of the legal process. General international law may arguably include certain treaties (especially codification conventions) which are law-making in nature and well-ratified on a global basis (such as the UN treaties discussed herein) without implying that all widely ratified treaties are part of general international law. See also Wood, 'The International Tribunal for the Law of the Sea and General International Law' (2007) 22 *International Journal Marine & Coastal Law* 351 at 354-5. Cf. Tomuschat, 'General International Law: A New Source of International Law?' in Pisillo Mazzeschi and De Sena (eds), *Global Justice, Human Rights and the Modernisation of International Law* (2018) 185.

138 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Merits, Judgment, ICJ Reports 2007, 43 at para 403.

139 Ebobrah, *supra* n 115 at 203.

140 Oda, 'The International Court of Justice from the Bench' (1993) 244 *Hague Recueil des Cours* 9 at 145. Cf. Caminos, 'The Growth of Specialised International Tribunals and the Fears of Fragmentation of International Law' in Boschiero et al. (eds), *supra* n 91 at 55. See also Guillaume, *supra* n 93; and Schwebel, *supra* n 96. Schwebel's position is admittedly much more nuanced.

141 Romano, *supra* n 16 at 266; Schabas, 'Introduction' in Schabas and Murphy, *supra* n 132, 1 at 20.

142 Bodeau-Livinec and Giorgetti, 'Developing International Law at the Bar: A Growing Competition among International Courts and Tribunals' (2016) 15 *The Law and Practice of International Courts and Tribunals* 177 at 185.

this discussion should be that two international courts disagreeing over the content of rules of international law is a healthy phenomenon.¹⁴³ In fact, given the nature of international law, and in the absence of explicit regulation by States, 'there can be as many judicial interpretations as there are [international] courts'.¹⁴⁴ Moreover, looking for and highlighting a handful of instances of divergences and/or disagreements¹⁴⁵ over-stresses the phenomenon and distorts the overall picture of communication and coordination among international courts.¹⁴⁶ It is also crucial how one appreciates divergence. There is a thin line separating divergence from the development of international law (or the potential to develop international law).¹⁴⁷ The *Loizidou* and *Tadić* cases are the most well-cited examples of giving rise to wrong and impermissible divergences to (general) international law.¹⁴⁸ However, in retrospect, *Loizidou*¹⁴⁹ is not treated anymore as a divergence to the ICJ's *Advisory Opinion on Reservations to the Genocide Convention*,¹⁵⁰ but as having paved the way for the enrichment of international law.¹⁵¹ The *Tadić* case is treated by many as hardly a drama,¹⁵² given the different relevant contexts of the jurisdictions of and cases before the ICJ and the International Criminal Tribunal for the Former Yugoslavia respectively.

Returning to the second point on the implications of distinguishing between courts of general jurisdiction and courts entrusted with specialized and/or regional jurisdiction, there is a growing acceptance of the role and value of regional and/or specialized courts and other bodies. The main frame of reference of this line of thinking is that

143 Schwebel, supra n 96 at 4.

144 Besson, 'Legal Philosophical Issues of International Adjudications: Getting Over the *Amour Impossible* between International Law and Adjudication' in Romano, Alter and Shany, supra n 12, 413 at 425.

145 Shany, supra n 101 at 20-30. See for discussion Brown, 'Review Essay - The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze' (2002) 3 *Melbourne Journal International Law* 453.

146 Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International & Comparative Law Quarterly* 791 at 797.

147 Oellers-Frahm, 'Proliferation' in Schabas and Murphy, supra n 132, 299 at 321.

148 For example, Guillaume, supra n 93 at 4-6; Jennings, 'The Judiciary, International and National and the Development of International Law' (1996) 45 *International & Comparative Law Quarterly* 1 at 6.

149 *Loizidou v Turkey (Preliminary Objections)* Application No 15318/89, 23 March 1995 [Grand Chamber] at paras 67-84.

150 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion, ICJ Reports 1951, 15.

151 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (New Application: 2002) Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, ICJ Reports 2006, 6 at Joint Separate Opinion of Judge Higgins, Judge Koijmans, Judge Elabary, Judge Owada and Judge Simma, para 23; Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden Journal of International Law* 745 at 747; Thirlway, 'The Proliferation of International Judicial Organs and the Formation of International Law' in Heere (ed.), *International Law and the Hague's 750th Anniversary* (1999) 433 at 437-8. The ILC Guide to Practice on Reservations to Treaties also affirm this: see Report of the ILC on the Work of its 63rd session, A/66/10/Add. 1, at Guideline 1.3.2, Guideline 2.1.2 and accompanied commentary.

152 *Prosecutor v Tadić* IT-94-1-AR72, Appeals Chamber, Interlocutory Appeal on Jurisdiction, 8 September 1995 at para 11. Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports 1986, 14 at para 222; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra n 138 at para 403. Higgins, supra n 146 at 795.

international courts have much to learn from each other¹⁵³ and that each international court, in one way or another, applies the law whose content has been influenced by other international courts as well as other bodies.¹⁵⁴ The ICJ, in a departure from its long-standing practice, now openly acknowledges and appreciates the authority of regional and special international courts.¹⁵⁵ The ICJ affirmed their contribution to ascertaining the formation and content of customary international law,¹⁵⁶ to discerning general principles¹⁵⁷ and to interpreting international treaties. In 2010, within the context of interpreting the ICCPR, the ICJ stated that '[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe *great weight* to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'.¹⁵⁸ The Court used the views of the CAT Committee to interpret the CAT,¹⁵⁹ the views of the HRC's to interpret the ICCPR,¹⁶⁰ and the views of the ACmHPR to interpret the ACHPR.¹⁶¹ Interestingly, in order to confirm its construction of the ACHPR, the Court gave due regard to the case law of both the ECtHR and IACtHR.¹⁶²

The foregoing points demonstrate that the possibility of different interpretations of UN and other treaties by the ACtHPR or the alleged risk to the coherence of international (human rights) law¹⁶³ should not be overemphasized. Such concerns can be mitigated as much as possible by way of interpretation and cross-judicial dialogue.¹⁶⁴

153 Supra n 92 at Separate Opinion of Judge Cançado Trindade, para 238.

154 Schwebel, supra n 96 at 4; Cançado Trindade, 'The Development of International Human Rights Law by the Operation and the Case Law of the European and Inter-American Courts of Human Rights' (2004) 25 *Human Rights Law Journal* 157 at 158.

155 Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 *Journal International Dispute Settlement* 1 at 12-4.

156 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* Merits, Judgment, ICJ Reports 2012, 99, at paras 72, 73, 76, 78, 90. See the draft conclusions of the ILC on identification of customary international law: see ILC, 70th Session, Identification of customary international law: Statement of the Chair of the Drafting Committee, Mr Charles Chernor Jalloh, 25 May 2018, at Draft Conclusion 13, 14, available at: legal.un.org [last accessed 16 March 2019]. Conclusion 13 reads: '[D]ecisions of international courts and tribunals, in particular of the ICJ, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules'. The decisions' value primarily depends on the quality of reasoning and on how they were received by States and future case law.

157 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Compensation, Judgment, ICJ Reports 2012, 324 at paras 13, 18, 24, 33, 40, 56.

158 *Ahmadou Sadio Diallo*, supra n 94 at para 66 (emphases added).

159 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Merits, Judgment, ICJ Reports 2012, 422 at paras 100-2.

160 *Ahmadou Sadio Diallo*, supra n 94 at para 67.

161 Ibid. at para 67.

162 Ibid. at paras 67-68; see also Separate Opinion of Judge Cançado Trindade, paras 232, 237.

163 Ebobrah, supra n 115 at 203.

164 For detailed discussion on how the ACtHPR interprets the ACHPR by taking other international rules into account, see Rachovitsa, 'The African Court on Human and Peoples' Rights: A Uniquely Equipped Testbed for (the Limits of) Human Rights Integration?' in Bribosia and Rovine (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation* (2018) 69.

In line with this, the ACtHPR gives refers extensively to the views of UN bodies¹⁶⁵ and the jurisprudence of other human rights courts.¹⁶⁶ The ECCJ also follows the same approach.¹⁶⁷ Interestingly, a characteristic example of the ACtHPR unjustifiably refraining from addressing issues of general international law is its orders relating to two separate requests for an advisory opinion on the same legal questions pertaining to the case of Al Bashir.¹⁶⁸ In particular, the questions asked by the authors of the requests concerned the relationship of an African State's obligations under the Rome Statute (obligation to cooperate with the International Criminal Court) and as AU Members (obligation to comply with an AU resolution calling for non-cooperation of its members with the International Criminal Court).¹⁶⁹ The Court rejected the requests because, among other reasons, 'the issues raised by the authors are rather of general public international law and not human rights. Indeed, the issues raised have to do with the hierarchy of norms in public international law'.¹⁷⁰ The Court's dubious reasoning, however, does not explain why these issues do not relate to a 'legal matter relating to the Charter or any other relevant human rights instruments' (Article 4(1) Protocol to the ACHPR) thereby falling under its jurisdiction to give an advisory opinion. What is all the more important for the present discussion is the artificial and unsound distinction that the Court drew between the so-called general international law and human rights as if human rights is an area unrelated to international law.¹⁷¹ Judge Ouguergouz in his dissenting opinion correctly highlighted that human rights, like any other matter governed by international law, is likely to raise issues relating to the law of treaties, including any issues of hierarchy of international norms.¹⁷² This (and the admittedly highly politicized issues concerning President Al Bashir) is not a reason for the Court to refrain from rendering an advisory opinion should the questions at hand relate indeed to a legal matter concerning the Charter (or any other relevant human rights instruments).

165 On the ACtHPR taking into consideration of General Comments by the HRC and the ICESCR Committee as authoritative statements on the interpretation of the provisions of the respective UN treaties, see *Tanganyika Law Society*, supra n 27 at para 107.4; *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 80 at para 181.

166 On the ACtHPR giving due regard to the case law of the ECtHR and the IACtHR, see *Lohé Issa Konaté*, supra n 75 at paras 147-54, 158-63; *Wilfred Onyango Nganyi & 9 Others*, supra n 77 at paras 136-54; *Alex Thomas*, supra n 77 at paras 146-7; *Tanganyika Law Society*, supra n 27 at para 82.1; *Actions pour la Protection des Droits de l'Homme*, supra n 37 at para 95; *Mohamed Abubakari*, supra n 77 at paras 25-7.

167 Taking cognizance of the practice of the HRC (for example, ECCJ, *Benson Olua Okomba v Benin* Application No ECW/CCJ/APP/27/14, 10 October 2017 at 24); the case law of the ECtHR (for example, *Benson Olua Okomba*, ibid. at 10, 13, 15, 16-7 and 23; *Dorothy Chioma Njemanze and 3 Others*, supra n 118 at 34, 37; ECCJ, *The Incorporated Trustees of Fiscal and Civic Right Enlightenment Foundation v Nigeria* Application No ECW/CCJ/APP/02/14, 7 June 2016 at 44-6); or the case law of the IACtHR (for example, *Benson Olua Okomba*, ibid. at 10-1, 23; *Dorothy Chioma Njemanze and 3 Others*, supra n 118 at 32, 39).

168 *Infra* n 56.

169 *Request No 1/2014 for Advisory Opinion*, supra n 56 at para 5; *Request No 1/2015 for Advisory Opinion*, supra n 56 at para 5.

170 *Request No 1/2015 for Advisory Opinion*, supra n 56 at para 18. See also *Request No 1/2014 for Advisory Opinion*, supra n 56 at para 13.

171 *Request No 1/2015 for Advisory Opinion*, supra n 56 at Dissenting Opinion of Judge Fatsah Ouguergouz, paras 18-22. See also Viljoen, supra n 11 at 92-3.

172 *Ibid.* at para 19.

Finally, a third reason for being particularly reluctant to entertain the possibility that a regional international court may monitor UN or other global treaties concerns specifically the *conceptual and geographical topos* of the ACtHPR. The authority of regional bodies to construe international law brings to the fore informal hierarchies among said international courts, and the structural imbalance entrenched in the Euro-centred map of the international law landscape.¹⁷³ The fixity of cities and spaces of delivering international justice, and developing international law, is well reflected in the very limited number and geographical worldwide scope of those cities in which these processes take place.¹⁷⁴ The 'law of Geneva' and the 'law of The Hague' assign international law a location, and narrate a specific story of progress.¹⁷⁵ This inhibits us from giving due regard to the seemingly unlikely places in which international law may be found.¹⁷⁶ The ACtHPR can be seen as part of a different plausible map of international law,¹⁷⁷ supporting a plurality of *loci* for experimenting with, and articulating, variant designs. As far as our perception is concerned, there is a geographical and conceptual distance to bridge between envisaging Geneva as the seat of the proposed World Court on Human Rights on the one hand,¹⁷⁸ and accepting the possibility that Arusha is the seat of the World Court on Human Rights for African States, on the other hand. Bridging this gap challenges us to rethink human rights law and institutions.¹⁷⁹ Murray has perceptively highlighted that international human rights law and international human rights scholars have focused primarily on European and Western sources and neglected other jurisdictions. Western scholars give the impression that one has little to learn from African institutions and their experiences, under the pretexts that the ACtHPR is a young institution, ineffective or irrelevant.¹⁸⁰ One should add to this that it is not only Western scholars, but also African scholars, who do not seem to value the unique features and potential of the ACtHPR; they focus, instead, on the alleged risks posed by the diversion from the mainstream 'model(s) of success' of regional human rights courts as well as, in general, the 'templates' of designing mechanisms of international judicial dispute settlement.¹⁸¹

(ii) *Introducing propriety considerations in exercising the African Court on Human and Peoples' Rights' jurisdiction?*

Interestingly, the ACtHPR may be developing a policy of judicial restraint when exercising its jurisdiction over human rights treaties other than the ACHPR. The Court proclaimed that it is not necessary to consider alleged violations of the ICCPR if it has already ruled on similar alleged violations under the relevant provisions of the

173 Pearson, 'Spaces of International Law' (2008) 17 *Griffith Law Review* 489 at 496.

174 Ibid. at 498.

175 Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and ... The Geographies of International Law' (2012) 23 *European Journal of International Law* 97 at 98. See also how, more broadly, the ordered categories of dispute settlement tell a powerful story in Romano, *supra* n 16 at 243.

176 Pearson, *supra* n 173 at 490.

177 Ibid. at 498.

178 Article 2 Draft Statute of the World Court on Human Rights.

179 Murray, *supra* n 18 at 197.

180 Ibid. at 193, 195.

181 Alter, Helfer and McAllister, *supra* n 5 at 779, is a rare example of scholars who embrace the potential of the ongoing 'natural experiment' in judicial dispute settlement in the African continent.

Charter.¹⁸² In this way, the Court seems to prioritize alleged violations under the Charter, but no criteria are articulated on when it is *unnecessary* to examine those other treaties. In other instances, the Court simply did not address the applicants' claims regarding alleged violations of the ICCPR and the ICESCR, without elaborating on the reasons for not doing so.¹⁸³ The Court maintains an inconsistent practice regarding the examination of similar or identical provisions given under different human rights treaties. For example, in the cases of *Lohé Issa Konaté* and *Ingabire Victoire Umuhoza*, the Court found that Article 19 of the ICCPR had been breached, whereas in *Abdoulaye Nikiema and Others* the Court deemed the examination of the alleged violation of Article 19 of the ICCPR unnecessary.¹⁸⁴ Another cluster of cases concerning the right to free legal assistance under the right to a fair trial provide further evidence of the discrepant case law. In its 2015 judgment in the *Alex Thomas* case, the ACtHPR found that Tanzania had failed to comply with its obligations under both the Charter and the ICCPR.¹⁸⁵ The subsequent *Wilfred Onyango Nganyi* case mentions a violation *only* of the Charter.¹⁸⁶ Finally, in the 2016 *Mohamed Abubakari* judgment, the Court framed the question before it as being one of whether the State was compliant with Article 7 of the Charter and Article 14 of the ICCPR, and proceeded to affirm that by failing to provide free legal assistance, Tanzania was in violation of both Article 7 of the Charter and Article 14 of the ICCPR.¹⁸⁷ At the other end of the spectrum, in the recent *APDF and The Institute for Human Rights and Development in Africa v Republic of Mali* judgment, the Court decided solely on alleged violations of other treaties on human rights without bringing the ACHPR into play.¹⁸⁸ It remains, therefore, to be seen whether this judgment signals a different approach of the Court or an exceptional circumstance.

It is notable that the ECCJ also appears to introduce certain caveats to the human rights treaties that it is willing to discuss. In a more rigorously articulated justification compared to the ACtHPR, the ECCJ, in *SERAP*, stated that when 'various articles of different instruments sanction the same rights, the said instruments may, as far as those specific rights are concerned, be considered *equivalent*'. It suffices therefore to cite the one which affords more effective protection to the right allegedly violated'.¹⁸⁹ The term 'equivalent' denotes norms which are identical or similar, but whose interpretation is subject to the structure, aim, specificities and development of their normative context.¹⁹⁰ Contrary to the ACtHPR, which favours the application of the Charter over other human rights provisions, the ECCJ prefers to apply the more favourable treaty.

182 *Tanganyika Law Society*, supra n 27 at para 123; *Abdoulaye Nikiema and Others*, supra n 26 at paras 115–118, 118, 157, 170, 188.

183 ACtHPR, *African Commission on Human and Peoples' Rights v Libya* Application No 002/2013, 3 June 2016 at para 77; *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 80 at para 2.

184 *Lohé Issa Konaté*, supra n 75 at para 176; *Ingabire Victoire Umuhoza*, supra n 75 at para 173(ix); *Abdoulaye Nikiema and Others*, supra n 26 at para 188.

185 *Alex Thomas*, supra n 77 at para 124.

186 *Wilfred Onyango Nganyi & 9 Others*, supra n 77 at para 184.

187 *Mohamed Abubakari*, supra n 77 at paras 140, 145.

188 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes*, supra n 84 at paras 9, 78, 95, 115, 125, 135.

189 *SERAP*, supra n 115 at para 92 (emphasis added).

190 Broude and Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in Broude and Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011) 1 at 5, 9.

The ECCJ's tendency to focus on the more favourable provision may be due to the fact that it does not have a constitutive catalogue of human rights, as the ACTHPR does. That said, since the 2012 *SEPAP* judgment, the ECCJ has given no indication that it actually applies this statement in practice. In instances in which many treaties were applicable to the facts of a case, the ECCJ found violations of a variety of human rights treaties and instruments (for example, the Charter, the ICCPR, CEDAW or even the UDHR) *in a cumulative fashion*, without choosing the more favourable and/or equivalent treaty provision.

The inconsistent case law of both Courts does not allow for definite conclusions to be drawn as to whether they actually apply the foregoing caveats to the exercise of their jurisdiction over treaties on human rights. It is possible that the two Courts will create judicial policies introducing propriety considerations, so as not to examine all relevant human rights treaties. It is not uncommon for international courts to limit the scope of a ruling without examining all submissions raised by the applicants or all possible legal bases. Different legal justifications may be furnished to justify such a judicial practice. First, international courts have the power to decide the scope of a claim, by determining how the legal grounds establishing their jurisdiction and the nature of the claims shape the subject of a dispute.¹⁹¹ A court has the power to ascertain its competence to entertain a legal claim which means that, even though it has jurisdiction to decide a complaint, it may deem it inappropriate to exercise said jurisdiction.¹⁹²

Second, international courts may not address all submissions by the applicants or all possible legal bases regarding the complaint(s) due to reasons of procedural economy, or due to their reluctance to address a particular question,¹⁹³ as long as a court's approach is not unduly reductive.¹⁹⁴ Third, it is also possible for international courts to make a choice of applicable law in cases in which many rules are applicable. This is not necessarily an issue of *lex specialis*, but rather an issue of 'locating the corpus of law at the heart of a difficult issue'.¹⁹⁵ An example is the *Legality of the Threat or Use of Nuclear Weapons*, in which the ICJ answered the question of the legality of nuclear weapons not by reference to human rights law (right to life under the ICCPR) or principles of environmental law, but by reference to *jus in bello*.¹⁹⁶ This was not an application of *lex specialis*, but a question of what norm and/or body of law is the most relevant to the matter as it was submitted to and construed by the ICJ. In light of the distinctive material jurisdiction of the ACTHPR extending over a variety of human

191 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Merits, Judgment, 4 June 2008, ICJ Reports 2008, 177 at paras 70-75; Kolb, *The International Court of Justice* (2013) at 188-90.

192 Although the ICJ usually considers the propriety of exercising its jurisdiction in its Advisory Opinions or in cases of *forum prorogatum*, propriety considerations can be relevant in contentious proceedings too: see Thirlway, *The Law and Procedure of the International Court of Justice* (2013) at 1658-62. *Certain Questions of Mutual Assistance in Criminal Matters*, supra n 191 at paras 70-5.

193 Harris et al. (eds), *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 4th edn (2018) at 803-4 (concerning Article 14 ECHR).

194 *Sükran Aydın and Others v Turkey* Applications Nos 49197/06 et al., Merits and Just Satisfaction, 27 May 2013 at para 3.

195 Higgins, supra n 146 at 792.

196 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996, 226 at paras 23-34.

rights treaties, one could argue that the ACtHPR may develop a practice of ‘calibrating’ the dispute and finding the heart of the matter brought before it.¹⁹⁷

The ACtHPR can employ either the procedural economy or the choice of applicable law avenues in order to legally justify, if it deems it necessary, a policy of exercising judicial restraint. In this regard, there is merit in the argument that the ACtHPR exercises its jurisdiction over other human rights treaties only when specific rights are not contained, or are differently formulated, in the ACHPR.¹⁹⁸ More generally, it is not unreasonable either that the Court decides complaints brought before it by prioritizing or choosing as a legal basis of a complaint a right that is provided for in AU treaties. In this way, the Court will find resort to non-AU treaties only when they bring in new rights¹⁹⁹ and, at the same time, it will not lose sight of developing the standards of the ACHPR and the African *corpus juris*. These suggestions also align with the equivalence idea that the ECCJ put forward in the *SEPAP* judgment and the ACtHPR’s practice to have the ACHPR in the foreground.

In sum, crafting judicial policies which introduce propriety considerations so that the ACtHPR does not examine all relevant human rights treaties presents risks. There is the possibility of unduly reducing the scope of the Court’s jurisdiction *ratione materiae*. Moreover, it is not an easy task to make and justify a choice of a human rights treaty, against which an applicant’s complaint shall be assessed. If the ACtHPR proceeds with adopting such a practice, it is strongly advisable that it elaborates on specific criteria as to whether or not a complaint under a human rights treaty should be examined. This is dictated by considerations of legal certainty and equal treatment of the applicants.

A few thoughts need to be devoted to the argument often raised that, if the Court exercises its broad jurisdiction to the fullest possible extent, this will create a political ‘backlash’²⁰⁰ or will deter States from ratifying the Protocol (or even other human rights treaties).²⁰¹ These political implications are implicitly framed as an issue for the Court’s judicial policy and it is, therefore, fitting to address them in this sub-Section. At this point in time, the practice of State parties to the ACHPR and the Protocol does not support these arguments. No State acting as a respondent State before the Court has ever challenged the Court’s construction of its material jurisdiction. If there were a climate of dissatisfaction among States with regard to this matter, it is very likely that they would have raised preliminary objections *ratione materiae* before the Court. It is only in *Tanganyika Law Society* that Tanzania challenged the broad interpretation of ‘human rights treaty’ but not the Court’s overall approach to its material jurisdiction.²⁰² Furthermore, the fact that States parties submit requests for the interpretation of the

197 *SERAP*, supra n 115 at para 93.

198 Viljoen, ‘Regional Institutions and Remedial Arrangements for the Judicial Enforcement of Economic, Social and Cultural Rights in Africa’ in Chirwa and Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 243 at 252.

199 *Ibid.* at 252-3.

200 For example, see discussion in Viljoen, supra n 7 at 438; and Viljoen, supra n 198 at 252-4.

201 For example, Heyns, supra n 7 at 167. Cf. Eno, ‘The Jurisdiction of the African Court on Human and Peoples’ Rights’ (2002) 2 *African Human Rights Law Journal* 223 at 227-8, who argues that, conversely, the wide scope of the Court’s jurisdiction may discourage States from using the ratification of the Protocol (or other human rights treaties) as a public relations’ exercise thereby leading in the long term to better compliance with the ACHPR.

202 Cf. the *SERAP* case by the ECCJ discussed in Section 3.2 above.

Court's previous judgments suggests that States take the Court's remedial orders seriously.²⁰³ More importantly, reducing the issue of States' consenting to and complying with the Court's mandate only to its wide jurisdiction *ratione materiae* downplays a variety of significant factors which may either deter States from acceding to the ACHPR and the Protocol or give rise to such a 'backlash'. These factors include the broad access to the Court (Article 5 Protocol to the ACHPR), compliance costs, ideological trends, domestic legal traditions and regional and domestic dynamics.²⁰⁴ One needs to bear in mind that the ACtHPR is called upon to function and develop its case law in a historical context in which not only judicialization of international affairs is being generally slowed down²⁰⁵ but also there is a general 'backlash' against international law institutions.²⁰⁶ In light of the foregoing, the present author is of the view that solely the possibility of a political 'backlash', which is an obviously extra-legal consideration, should not interfere with the Court's mandate and jurisdiction.

C. The Anxiety of Threatening African Human Rights Law

(i) Undermining the specificity of African human rights law

Heyns argues that the broad jurisdiction of the ACtHPR poses a risk to the specificity of the ACHPR because the latter becomes but one treaty among others before the ACtHPR.²⁰⁷ Although he does not clarify in what way this is a risk, it is likely he means that the Court may be satisfied with finding violations of other treaties at the expense of developing the Charter's standards, and nurturing an African human rights jurisprudence.²⁰⁸ This is a valid concern. The Court's case law evidences that the Charter is at the core of its legal reasoning, and it systematically discusses alleged violations of the Charter *hand in hand with other treaties*, as shown in Section 3.2. Nonetheless, this was not the case in the 2018 APDF judgment. In this instance, the Court found Mali in breach of its obligations under CEDAW, the Maputo Protocol and the African Charter on the Rights and Welfare of the Child, without making any effort

203 ACtHPR, *Interpretation of the Judgment of 3 June 2016—Mohamed Abubakari v United Republic of Tanzania* Application No 002/2107, 28 September 2017; ACtHPR, *Interpretation of the Judgment of 18 November 2014—Actions pour la Protection des Droits de l'Homme v Republic of Cote d'Ivoire* Application No 002/2107, 28 September 2017; ACtHPR, *Interpretation of the Judgment of 20 November 2015—Alex Thomas v United Republic of Tanzania* Application No 001/2107, 28 September 2017.

204 Zschirnt, *supra* n 11; Alter, Gathii and Helfer, *supra* n 11.

205 Romano, *supra* n 16 at 274-5.

206 Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *Modern Law Review* 1. For example, the instance in which the ACmHPR recently stripped the Coalition of African Lesbians of its observer status (following decisions by the African Union Executive Council that called on the Commission to consider 'historical tradition and the values of African civilization') when reviewing applications for observer status needs to be appreciated in light of specificities of the African region as well as general developments in international affairs: see Executive Council African Union, Decision EX.CL/Dec.1015(XXXIII) (33rd Ordinary Session, 28-29 June 2018, Nouakchott, Mauritania) at paras 5, 6(i), 8(iv) and (vii); International Justice Resource Center, *African Commission Bows to Political Pressure, Withdraws NGO's Observer Status*, 28 August 2018, available at: ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/ [last accessed 16 March 2019].

207 Heyns, *supra* n 7 at 167.

208 Viljoen and Baimu, 'Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 241 at 253.

proprio motu to identify relevant provisions of the Charter or to link the Charter with the facts of the case and the applicant's submissions. The Court perhaps preferred to focus on specialized treaties regarding women's and children's rights, but still the Court should have furnished a link with States' obligations under the Charter too. It should be noted that, on this occasion, most of the treaties that the Court discussed (besides CEDAW) are African treaties and, hence, the Court was still developing the African *corpus juris*.

Creating a 'variable geometry' of State parties' obligations is another point raised regarding the undermining of African human rights by the Court's broad jurisdiction. According to this argument, if the obligations of State parties differ depending on what other human rights treaties a given respondent State has ratified,²⁰⁹ this may result in a 'variable geometry' of obligations of African States under the Charter and, therefore, inhibit the construction of an African human rights *corpus juris*. This is not a significant problem (or even a problem in the first place), given that international law in its essence consists of many different variable geometries of international obligations. It is possible for the Court to develop the *corpus juris* of African human rights while considering and monitoring the implementation of specific treaties, with regard to the specific respondent State(s) in each case.

The risk of undermining the specificity of African human rights law is more likely to materialize not as a result of the ACtHPR's broad jurisdiction, but in the context of the interpretation process.²¹⁰ The ACtHPR's systematic reliance on the case law of the European and Inter-American Courts of Human Rights may, in certain instances, raise the question of whether such influence can be disproportionate. Conceptualizing the development of the ACHPR within the context of international human rights law is a challenging task for a young international court. On the one hand, it is expected of the ACtHPR to take into consideration, and benefit from, the long-standing jurisprudence of other regional human rights courts or the views of UN bodies. Articles 60 and 61 of the ACHPR contain concrete guidelines in this regard.²¹¹ On the other hand, coordination and convergence with global and other regional standards should not lead to neglecting the development of a regional (African) human rights' understanding, the contours of which have already been established by the ACmHPR.²¹² This specificity is rooted in the unique characteristics of human rights in the design of the ACHPR, including the equal weight accorded to civil and political rights, economic, social and cultural rights and also peoples' rights, as well as the local (legal) reality in State parties to the ACHPR. Such particularity gives rise to, and justifies, different interpretations of specific human rights (compared to how the same or identical rights are interpreted

209 Heyns, *supra* n 7 at 167. See also Mujuzi, *supra* n 10 at 193.

210 Rachovitsa, *supra* n 164.

211 Article 60 states: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members'.

212 Perrin, 'African Jurisprudence for Africa's Problems: Human Rights Norm Diffusion and Norm Generation Through Africa's Regional International Court' (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law)* 32 at 32-3.

under other treaties).²¹³ It is also pertinent to draw a distinction between AU treaties and non-AU human rights treaties. AU treaties (for example, the African Charter on the Rights and Welfare of the Child, the ECOWAS Revised Treaty, the ECOWAS Democracy Protocol) and especially when these AU treaties are protocols to the ACHPR (for example, the Maputo Protocol) should have a privileged position *vis-à-vis* non-AU treaties in the Court's reasoning with a view to nurturing the Charter in its 'native' environment and to pursue the African *corpus juris*.

The ways in which the ACtHPR selects and uses relevant international instruments and views of other (non-AU) monitoring bodies and international courts when construing the Charter are crucial. A few concrete examples are called for. When the ACtHPR is in the process of discerning the ordinary meaning of a provision in the ACHPR its starting point and primary focus should be the text of the ACHPR, without resorting prematurely to the case law of the ECtHR regarding the interpretation of an equivalent right under the ECHR. This is what happened in *Wilfred Onyango Nganyi*, when the ACtHPR, in establishing the meaning of 'trial within a reasonable time' under Article 7(1)(d) of the ACHPR, had recourse to the criteria of reasonableness developed throughout the extensive case law of the ECtHR.²¹⁴ Moreover, the ACtHPR should engage in its reasoning with both the global and other regional standards in a balanced and consistent manner—especially if the respondent State is bound by said global standard(s).²¹⁵ Otherwise, the ACtHPR runs the risk of 'Europeanizing' or 'Inter-Americanizing' its jurisprudence,²¹⁶ in the sense of overemphasizing the relevance and influence of other regional human rights treaties. The criteria set out by the jurisprudence of other international courts need to be tailored and applied in light of local circumstances and legal reality in African countries. In *Mohamed Abubakari*, the fact that the judgment was not delivered publicly should have arguably been given more weight in the assessment of the alleged violation of the right to a fair trial under the ACHPR since, unlike in Europe, it is not common practice in many African States to have immediate access to the text of the judgment.²¹⁷ Moreover, the ACHPR in the *APDF* judgment case should have brought into play the ACHPR and, more specifically, it should have engaged with the question of whether and, if yes, how the duties of individuals toward the community (Articles 27 and 29 ACHPR) could have a legal relevance to the interpretation of women's and children's rights.

Another example of the potentially problematic use of other, especially non-AU, international instruments and views of other bodies when interpreting the Charter is the ways in which the ACtHPR addresses peoples' rights under the ACHPR, since 'contrary to other human rights instruments, the ACHPR establishes the link between the right to life and the inviolable nature and integrity of the human being',²¹⁸ and

213 Brems, *Human Rights: Universality and Diversity* (2001) at 116-7, 126-8, 133-6.

214 *Wilfred Onyango Nganyi & 9 Others*, supra n 77 at paras 136-154; Mujuzi, supra n 10 at 218.

215 This was underlined in the Partly Dissenting Opinion of Vice-President, Justice Thompson in *Mohamed Abubakari*, supra n 77 at paras 9-10 and the Dissenting Opinion of Judge Rafâa Ben Achour, *ibid.* at paras 15-17.

216 Mujuzi, supra n 10 at 218-9.

217 *Ibid.*

218 *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 80 at para 152.

violations of economic, social and cultural rights may engender conditions unfavourable to a decent life. In the *African Commission on Human and Peoples' Rights v Republic of Kenya* case, the Ogiek people claimed that limited access to and removal from their ancestral home amounted to a violation of the community's right to decent survival, under Article 4 of the ACHPR. Even though the ACTHPR recognized the Ogiek as an indigenous population, and it held that the expulsion of the Ogiek from their ancestral lands against their will and without prior consultation violated their communal ownership rights under the right to property, it left unclear whether this violation was pronounced with regard to the individual members of the Ogiek or the Ogiek as a people.²¹⁹ In that judgment, the ACTHPR took cognizance of the practice of the ACMHPR, the views and General Comment of the ICESCR Committee and the case law of the IACTHR. This leaves one but to wonder to what extent the practice of these bodies is of sufficient relevance to the ACHPR's broader and more promising provisions, which are not to be found in other human rights treaties.²²⁰

(ii) *Fragmenting African human rights law*

Whereas the previous analysis addressed how the ACTHPR may raise legal concerns regarding its engagement with other human rights treaties, the present sub-Sections focuses on the alleged risk of undermining the Charter due to differing interpretations of the Charter by the ACTHPR and the ECCJ. This brings to the foreground the regional *vis-à-vis* the sub-regional levels of analysis.

In the absence of a catalogue of human rights in the ECOWAS Revised Treaty, the ECCJ decides human rights complaints by adopting the Charter as its standard of assessment.²²¹ It maintains that the Charter instantiates the 'African regional human rights framework'.²²² The ECCJ's interpretation, application and monitoring of the Charter is seen by some as leading to possibly diverging interpretations or conflicting judgments, and hence fragmentation of African human rights law.²²³ Moreover, the ACTHPR and the ECCJ could, in theory, impose different obligations upon States which

219 The ACTHPR reserved its judgment on reparations, which is currently pending: see *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 80 at paras 128-131, 223. Cf. *African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Application No 155/1996, 27 October 2001 at paras 60-67, in which the ACMHPR acknowledged that the Ogoni peoples' right to property, right to housing and right to a dignified life were violated as collective human rights.

220 Cf. *Case of the Kaliña and Lokono Peoples v Suriname* IACTHR Series C 309 (2015) at paras 107-114; see also Partly Dissenting Opinion of Judge Alberto Pérez Pérez, para 9.

221 According to Article 19(1) Protocol (A/P.1/7/91 on the Economic Community Court of Justice, 6 July 1991) the ECCJ 'shall apply the Treaty, the Rules of Procedure and, as necessary, Article 38 ICJ Statute'. The ECCJ established its jurisdiction over the ACHPR by reference to Article 4(g) of the 1993 Revised Treaty of ECOWAS, which reads: '[T]he High Contracting Parties, in pursuit of the objectives stated in Article 3 of the Treaty solemnly affirm and declare their adherence to the following principles: ... (g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

222 ECCJ, *Omar Jallow v Gambia* Application No ECW/CCJ/APP/33/16, 10 October 2017 at 10. See also ECCJ, *Ugokwe v The Federal Republic of Nigeria* Application No ECW/CCJ/APP/02/05, 7 October 2005 at para 29.

223 For example, Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1 at 14.

have accepted the ACtHPR's competence to receive individual complaints and are also ECOWAS Member States.²²⁴ Finally, this could also mean that the same matter may be submitted consecutively before both courts. The ACHPR, however, does not have a provision precluding this scenario, and the Statute of the ECCJ prohibits only the *concurrent* submission of an application concerning the same matter before another international court.²²⁵

It is striking how this discussion transplants the arguments and anxieties from the context of general bodies/global courts *vis-à-vis* regional/specialised courts into the context of regional *vis-à-vis* sub-regional courts on human rights. First, it is assumed that any tensions and different approaches in the case law of the ACtHPR and the ECCJ are negative, even though as previously discussed, such differences can be productive and meaningful and, in any event, not detrimental. Another recurring theme revolves around the protection of the integrity of the global and regional standards which are allegedly threatened by the regional/specialized and sub-regional courts, respectively. One cannot fail to notice the irony of scholars who argue that the inclusion of other (non-African treaties) into the jurisdiction of the ACtHPR undermines the specificity of African human rights law (as discussed in the previous sub-Section) and, at the same time, dismiss the opportunity to have two African courts enhancing the specificity of the regional bill of rights. The dominant perception in international law is that other bodies should not engage with, construe or monitor other treaties; and that the global or regional courts and standards are challenged or undermined by the regional and sub-regional courts and standards, respectively.²²⁶ Our frame of reference should not be that a court holds a monopoly over its constitutive treaty. Neither the ACHPR nor the Protocol establishing the ACtHPR confer exclusive jurisdiction on the ACtHPR.²²⁷ Our starting point should be, instead, that international courts have a 'shared ownership' over the regional bill of rights and pursue a common endeavour.²²⁸

Crucially, there is nothing in the case law of the two courts to substantiate the concern about lowering the standards of the regional bill of rights.²²⁹ On the contrary, they seem to share a vision of exercising a 'shared ownership' over the regional bill of rights which sets the minimum standard. The use and application of the Charter by the ECCJ strengthens the clarity of international law and deepens human rights protection.²³⁰ In general, the overlap between the UN covenants and regional and

224 Four out of the seven ECOWAS Member States are also subject to the ACtHPR's jurisdiction: Benin, Burkina Faso, Côte d'Ivoire, Ghana and Mali.

225 Article 10(d) of Supplementary Protocol A/SP.1/01/05 amending Protocol A/P.1/7/91 relating to the Economic Community Court of Justice, 19 January 2005. Cf. Article 6(2) Protocol to the ACHPR and Article 56(7) ACHPR. See discussion in Murungi and Gallinetti, *supra* n 97 at 126.

226 Viljoen, *supra* n 7 at 496, suggests that the 'sub-regional courts follow the African Court's interpretation, when such an interpretation exists, or by working a system of referral to the African Court for interpretative guidance'. Murungi and Gallinetti, *ibid.* at 135, argue that the ACHPR is in a hierarchical position *vis-à-vis* sub-regional human rights instruments and, hence, the use of the ACHPR by the ECCJ blurs the normative hierarchy.

227 Ebobrah, *supra* n 120 at 11. See, in general, Besson, *supra* n 144 at 425.

228 Helfer, *supra* n 78 at 349-53.

229 Murungi and Gallinetti, *supra* n 97 at 130.

230 Alter, Helfer and McAllister, *supra* n 5 at 778; Ebobrah, 'Litigating Human Rights before Sub-Regional Courts in Africa: Prospects and Challenges' (2009) 17 *African Journal of International & Comparative Law* 79 at 88.

sub-regional human rights law, and their respective monitoring bodies, enhances the influence of the UN covenants in the domestic sphere of African States and consolidates human rights standards.²³¹ The courts' systematic engagement with UN treaties, the references to and use of the practice of the HRC and the case law of other regional courts on human rights point toward this direction.²³² In addition to this, important and interesting issues (some of which have not found their way before the ACtHPR yet) are being litigated before the ECCJ,²³³ since the EECJ enjoys a broad jurisdiction and grants direct access for individuals without a requirement to exhaust domestic remedies.²³⁴ The subject matter of cases heard by the ECCJ spans across slavery; electoral systems and the right to political participation; independence of the judiciary; gender-based discrimination with regard to inheritance rules; reparation for terrorism victims; procedural aspects of the right to life; effective remedies; self-determination; and natural resources.

As long as the ECCJ gives due regard to the pronouncements of the ACtHPR and the ACmHPR, any tensions or differing interpretations shall be mitigated appropriately. This, of course, goes both ways—the ACtHPR also needs to take the ECCJ's judgments into account with regard to the ECCJ's pronouncements on both the Charter and other regional and sub-regional treaties and instruments on human rights which form the African *corpus juris*. The continental ACtHPR regularly applies and declares violations of regional treaties, such as the African Charter on Democracy,²³⁵ and sub-regional treaties, including the ECOWAS Revised Treaty,²³⁶ the ECOWAS Democracy Protocol²³⁷ and the Maputo Protocol.²³⁸ The absence of any discussion on why it is only a sub-regional but not a regional court on human rights that may undermine the African *corpus juris* reinforces the argument that unfounded, informal hierarchies among international courts are very well entrenched in the way we survey the legal horizon.

4. CONCLUSION

The ACtHPR's distinctive jurisdiction to interpret, apply and monitor not only the ACHPR but also other human rights treaties gives rise to a unique institutional design in judicial adjudication. It is expected that the subject matter of the complaints brought before the Court will further diversify in the future, and that the Court will have more opportunities to clarify the scope of its jurisdiction, as well as to nurture the specificities of the ACHPR and the African *corpus juris*.

231 Besson, 'The Influence of the Two Covenants on States Parties Across Regions: Lessons for the Role of Comparative Law and of Regions in International Human Rights Law' in Moeckli and Keller (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (2018) 243 at 261-2, 269-73.

232 See *infra* nn 164-167 and accompanying text.

233 Alter, Helfer and McAllister, *supra* n 5 at 738.

234 Cf. Article 10(d) Supplementary Protocol A/S P.1/01/05 amending Protocol A/P.1/7/91 relating to the Economic Community Court of Justice, 19 January 2005 with Article 6(2) Protocol to ACHPR in conjunction with Article 56(S) and (6) ACHPR and Rules 34 and 40, Internal Rules of the ACtHPR, *supra* n 70.

235 *Actions pour la protection des droits de l'homme*, *supra* n 39.

236 Lohé Issa Konaté, *supra* n 75 at para 12; Abdoulaye Nikiema and Others, *supra* n 26.

237 *Actions pour la protection des droits de l'homme*, *supra* n 39; Jerome Bougouma and Others, *supra* n 116 at 3.

238 Dorothy Chioma Njemanze and 3 Others, *supra* n 118 at 2-3.

The present author does not find it, in principle, problematic that the UN and other treaties may be justiciable and enforceable by a regional and specialized court on human rights, since the ACtHPR has specifically been endowed with the authority to do so. More generally, international courts should have as their frame of reference a vision of 'shared ownership' over international law. The analysis in this article has demonstrated that many international courts, including the ICJ, are gradually adopting this framework. The possibility of divergent interpretations of similar or identical rules of international law is largely overstressed in legal scholarship. Moreover, differences in courts' approaches also need to be appreciated as being productive and meaningful and, in any event, not that detrimental.

Although many of the concerns expressed by international law scholars regarding the exercise of the Court's jurisdiction are generally overemphasised, the Court's jurisdiction is not without issues to address. The analysis highlighted certain difficulties regarding the concept of 'human rights treaty' as a prerequisite for the Court to exercise its jurisdiction. The introduction of propriety considerations to the ACtHPR's jurisdiction is a work in progress in the Court's case law. It cannot be ruled out that the Court will adopt a judicial policy of self-restraint with regard to (not) examining specific complaints under other human rights treaties. Should the Court proceed with adopting such a judicial policy, it is strongly advisable that it clarifies concrete criteria and it does not reduce unduly the scope of its clear mandate. Finally, the development of the ACHPR's standards and the construction of a regional human rights *corpus juris* have nothing to fear from the wide jurisdiction of the ACtHPR. Finally, the development of the ACHPR's standards and the construction of a regional human rights *corpus juris* have nothing to fear from the wide jurisdiction of the ACtHPR as long as the Court is cautious as to the relevance and weight it attaches to other treaties, and the jurisprudence of other international courts and bodies when interpreting the Charter. A critical factor that will determine the Court's role, the development of a sustainable jurisprudence, compliance on behalf of the respondent States and a possible increase of the number of States accepting the Court's jurisdiction, is the quality of its judgments.²³⁹ This includes the clarity of its reasoning and the comprehensiveness of the grounds of its decisions. The Court needs to address all points raised by the parties to a case in a satisfactory manner, and to properly deal with issues pertaining to its jurisdiction.²⁴⁰

239 For the ECtHR, see Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd edn (1993) at 21. For the ICJ, see Lauterpacht, *The Development of International Law by the International Court* (1958) at 37-44; and Damrosch, 'Article 56' in Zimmermann, Tomuschat and Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd edn (2012) 1366 at 1374-5.

240 Murray, 'A Comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 195 at 220.